Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

DLX, INC.,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY, KENTUCKY ENVIRONMENTAL AND PUBLIC PROTECTION CABINET, AND THE SECRETARY, KENTUCKY ENVIRONMENTAL AND PUBLIC PROTECTION CABINET, IN HER OFFICIAL CAPACITY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves the Fifth Amendment and Fourteenth Amendment takings claim of Petitioner, DLX, Inc. ("DLX"), brought in the United States District Court for the Eastern District of Kentucky against the Commonwealth of Kentucky, the Kentucky Natural Resources and Environmental Protection Cabinet (the "Cabinet"), and James E. Bickford, in his official capacity as Secretary of the Cabinet (referred to hereinafter together as the "Commonwealth"). DLX's claim arises out of the denial by the Cabinet of the DLX application for a permit to mine coal beneath the Lilley Cornett Woods (the "Woods") in Letcher County, Kentucky. The following question is presented:

> Did the Sixth Circuit err in its determination that Kentucky enjoys sovereign immunity, in federal district court, from DLX's Fifth and Fourteenth Amendment takings claim?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are set forth in the case caption. Subsequent to the filing of this case, the Kentucky Environmental and Public Protection Cabinet was created by the Kentucky governor's executive order consolidating the former Natural Resources and Environmental Protection Cabinet, Labor Cabinet and Public Protection and Regulation Cabinet. Secretary Bickford passed away several months after the filing of the complaint in the district court.

DLX, Inc. ("DLX") is a closely-held Kentucky corporation with no corporate parent. No publicly held company owns 10% or more of the stock of DLX.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is reported at 381 F.3d 511 (6th Cir. 2004). (App. B, pp. 3a-45a.) The decision of the Sixth Circuit denying DLX's petition for rehearing en banc is unreported. (App. A, pp. 1a-2a.) The decision of the district court on the merits is unreported. (App. C, pp. 46a-57a.)

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered its judgment in this case on August 26, 2004. The court of appeals denied DLX's petition for rehearing en banc on October 28, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part, as follows:

> No person shall . . . be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

U.S. Const. amend. V.

The Eleventh Amendment to the United States Constitution provides as follows:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United

> States by citizens of another State, or by citizens or subjects of any foreign state.

U. S. Const. amend. XI.

The first section of the Fourteenth Amendment to the United States Constitution provides, in pertinent part, as follows:

> [N]or shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A. Facts

The basic disagreement between DLX and the Commonwealth over the issuance of the mining permit concerned the distance from the surface of the Woods the DLX mining would be required to maintain (referred to as the vertical cover requirement). (R. 5 Memorandum in Support, pp. 4-5, JA. pp. 22-33;[1] R. 8 Response to Motion to Dismiss, pp. 3-4, JA. pp. 300-301.) In this mountainous region, a greater vertical cover requirement translates into a smaller amount of coal which can be mined. At the two extremes, if no vertical cover is required (as with mountaintop removal mining), theoretically all of the coal can be mined; if the

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[1] "JA" refers to the Joint Appendix filed in the Sixth Circuit.

required vertical cover is equal to the height of the mountain, no coal can be mined.

During the permitting process, DLX submitted a number of permit applications with greater and greater proposed vertical cover for its mining. The Cabinet insisted that DLX leave at least 250 feet of vertical cover and DLX proposed, but then withdrew, a revision to its permit application which would have left a 250-foot vertical cover (because it determined that the 250-foot vertical cover requirement would render the remaining coal economically unmineable). (R. 8 Response to Motion to Dismiss, Appendix 2 HT Vol 1 pp. 45-46, JA. pp. 350-351.[2]) The last DLX permit application proposed a vertical cover of 110 feet. This application was denied. (R. 5 Memorandum in Support, pp. 4-5, JA. pp. 22-23; R. 8 Response to Motion to Dismiss, pp. 3-4, JA. pp. 300-301.)

DLX petitioned for review of the permit denial and a lengthy administrative hearing was held. After the hearing, the hearing officer recommended that the denial of the DLX permit application be affirmed. The Secretary of the Cabinet adopted the hearing officer's report and recommendations and affirmed the denial of the permit application. DLX did not appeal the final order of the Secretary, but instead filed a claim, in the Franklin County Kentucky Circuit Court, for compensation under the takings clause of the Kentucky Constitution. The circuit court dismissed the DLX claims because it found that appeal of the final agency order

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[2] Appendix 2 to the DLX Response to Motion to Dismiss is a collection of excerpts from the transcript (hereinafter referred to as "HT") of the testimony during the administrative hearing on the permit denial.

(pursuant to KRS 350.0305) was a prerequisite to the bringing of a claim for compensation pursuant to §242 of the Kentucky Constitution.

The Kentucky Court of Appeals reversed the trial court, but the Kentucky Supreme Court (with two Justices dissenting) reversed the decision of the court of appeals and held "DLX's failure to exhaust its administrative remedies by failing to appeal the Secretary's Order, deprived the Franklin Circuit Court of subject-matter jurisdiction to hear DLX's takings claim." *Kentucky v. DLX*, 42 S.W.3d 624, 625-626 (Ky. 2001). (App. D, p. 63a.)

B. Proceedings Below

1. The District Court:

DLX filed this action in the Eastern District of Kentucky on April 25, 2002, claiming that the action of the Commonwealth: (a) constituted a taking of property for which DLX is entitled to just compensation under the Fifth and Fourteenth Amendments of the United States Constitution, (b) violated DLX's right to due process as secured by the Fifth and Fourteenth Amendments of the United States Constitution, and (c) constituted a violation of 42 U.S.C. § 1983. (R. 1 Complaint, pp. 4-5, JA. pp. 8-9). The district court had jurisdiction in this action pursuant to 28 U.S.C. §§ 1331 and 1343, because the action arises under the Constitution and laws of the United States.

The DLX Complaint in the district court included the claims that: (1) the DLX mining would be conducted through existing mine openings without new mine entries in the Woods (R. 1 Complaint, pp. 2-3, JA. pp. 6-7), (2) the protections of the hydrological consequences of the mining built into the

permit application were at least as extensive as those provided for mining under adjacent properties (R. 1 Complaint, p. 3, JA. p. 7), (3) the Commonwealth had no legal authority to treat mining under the Woods differently than mining under other properties (R. 1Complaint, p. 3, JA. pp. 7), (4) the Commonwealth produced no evidence that mining would harm the Woods (R. 1 Complaint, p. 3, JA. p. 7), and (5) DLX produced considerable evidence that mining would not harm the Woods (R. 1 Complaint, p. 3, JA. p. 7). The Complaint alleged that the Commonwealth's actions were a complete taking of DLX's property, leaving DLX without any rights with respect to its coal (R. 1 Complaint, p. 4, JA. p. 8). The Complaint also alleged that DLX sought compensation in the state courts but was denied relief (R. 1 Complaint, p. 4, JA. p. 8).

Prior to filing an answer and before the taking of any discovery, the Commonwealth moved to dismiss the complaint and raised four issues which it claimed deprived the district court of subject-matter jurisdiction: (1) sovereign immunity under the Eleventh Amendment to the United States Constitution; (2) ripeness; (3) exhaustion of administrative remedies; and (4) res judicata and the *Rooker/Feldman* doctrine. (R. 5 Motion to Dismiss, pp. 1-2, JA. pp. 10-11.) On March 24, 2003, the district court entered its Memorandum Opinion & Order dismissing the DLX claims. (App. C.) The district court ruled that it lacked jurisdiction under the *Rooker/Feldman* doctrine and that the DLX takings claims were not ripe. (App. C, pp. 55a-56a.) The district court did not address the Commonwealth's other arguments.

2. <u>The Court of Appeals</u>:

DLX appealed the district court's dismissal and the Sixth Circuit found that the district court was incorrect in its

ripeness and *Rooker-Feldman* analysis, but relied on Eleventh Amendment immunity to nevertheless affirm the district court. The panel (with the concurrence of Circuit Judge Baldock as to the judgment of dismissal only) concluded:

> Because Kentucky enjoys sovereign immunity in the federal courts from DLX's federal takings claim, the district court was correct to dismiss the DLX's [sic] complaint for want of jurisdiction.

DLX v. Kentucky, supra, at 528. (App. B, p. 34a.)

The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, because the proceedings there involved an appeal from the final decision of the United States District Court for the Eastern District of Kentucky granting the Commonwealth's motion to dismiss.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit Decided an Important Question of Constitutional Law Which Has Not Been, but Should Be, Resolved by this Court.

The Sixth Circuit's Decision, That the Eleventh Amendment Bars Prosecution of Takings Clause Claims Against States in Federal District Court, Is Inconsistent with the Dominant Thrust of this Court's Fifth Amendment, Eleventh Amendment, and Fourteenth Amendment Jurisprudence.

The Sixth Circuit Reasoning:

The sum and substance of the court of appeals reasoning appears to be that while the Fifth Amendment is self-executing, it is only self-executing in state courts. The court first noted that "[t]he barrier is not . . . Eleventh Amendment immunity . . . . The stopper [is] that §1983 creates no remedy against a State." *DLX v. Kentucky, supra*, at 526 (App. B, p. 30a), quoting from *Arizonans for Official English v. Arizona,* 520 U.S. 43, 69 (1997). The court then went on to observe, however:

> *First English* makes clear that the Fifth Amendment Takings Clause is a self-executing remedy, notwithstanding sovereign immunity. *See* 482 U.S. at 316 n. 9, 107 S.Ct. 2378. Therefore, had DLX brought a federal claim with its state claim in state court, the Kentucky courts would have had to hear that federal claim, and likely could not have required exhaustion as a prerequisite to hearing the federal

> claim[3], *see Felder v. Casey,* 487 U.S. 131, 146-47, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988), but this court is powerless to hear it.

DLX v. Kentucky, at 527-528.[4] The Sixth Circuit concluded, in other words, that (assuming a taking occurred) DLX has a federal constitutional right to compensation from Kentucky, but has no federal court remedy. That determination is inconsistent with this Court's Fifth Amendment, Eleventh Amendment and Fourteenth Amendment decisions.[5]

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[3] The panel recognized the difficulty of squaring Eleventh Amendment immunity with this Court's holding in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 87 L.Ed. 2d 126 (1985) (that state law compensation remedies must be exhausted before a federal takings claim even exists), but expressed the hope that state courts will just ignore *Williamson* in the future and proceed on state compensation claims and Federal Fifth Amendment claims at the same time.

[4] Several state courts have addressed this issue. The court in *Manning v. Mining & Minerals Div. of the Energy, Minerals, & Natural Res. Dep't,* 135 N.M. 487, 90 P.3d 506 (Ct.App.2004), *cert. granted,* 135 N.M. 565, 92 P.3d 11 (2004), determined that the Takings Clause is not self-executing and that, consequently, a person deprived by a state of his or her property has no federal Constitutional remedy even in state courts. *But, see SDDS, Inc. v. South Dakota,* 650 N.W.2d 1, 8-9 (S.D.2002) ("South Dakota's sovereign immunity is not a bar to SDDS's Fifth Amendment takings claim."); *Boise Cascade Corp. v. Oregon,* 164 Or.App. 114, 991 P.2d 563, 565-69 (1999) (relying on *First English* in holding that "at least some constitutional claims are actionable against a state, even without a waiver or congressional abrogation of sovereign immunity, due to the nature of the constitutional provision involved").

[5] That determination is also inconsistent with the Congressional grant of jurisdiction to the federal district courts. 28 U.S.C. §1331 provides that: "[t]he district courts shall have original jurisdiction

Other Circuit Court Decisions:

The Sixth Circuit's decision in *DLX v. Kentucky* is squarely in conflict with its decision in *Arnett v. Myers,* 281 F.3d 552 (6th Cir.2002), a case which involved, among other things, due process, equal protection, and just compensation claims against the Executive Director of the Tennessee Wildlife Resources Agency and members of the Tennessee Wildlife Resources Commission, in their official capacities. The DLX panel attempted to distinguish *Arnett*, by finding that in *Arnett*, "the plaintiffs clearly only sought declaratory and injunctive relief, thus allowing the case under the *Ex Parte Young* exception." *DLX v. Kentucky, supra, at n.14.* However, the panel was incorrect about the holding in *Arnett.* The *Arnett* opinion made clear that "The plaintiffs-appellants articulated claims for denial of procedural due process, equal protection, and just compensation for takings under the Fifth and Fourteenth Amendments." *Arnett* at 562. (Emphasis supplied.) Moreover, the *Arnett* court ruled that: "Genuine issues for trial exist in this case as to . . . . (c) whether the

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of all civil actions arising under the Constitution, laws, or treaties of the United States." (Emphasis supplied.) 28 U.S.C. §1343 provides, in part, that:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. . . .

(Emphasis supplied.)

removal and destruction of the duck blinds constituted a "taking" and, if so, the amount of just compensation the Arnetts were due for that taking. . . ." *Id.* at 566-567. (Emphasis supplied.) The *Arnett* court stated flatly "Eleventh Amendment sovereign immunity does not bar the Arnetts' claims in this case." *Id.* at 568.

It appears that four other Circuit Courts of Appeal have addressed takings claims against states-- *Citadel Corporation v. Puerto Rico Highway Authority*, 695 F.2d 31(1st Cir. 1982); *Robinson v. Georgia Department of Transportation*, 966 F.2d 637 (11th Cir. 1992); *John G. and Marie Stella Kenedy Memorial Foundation v. Mauro*, 21 F.3d 667 (5th Cir. 1994), and *Broughton Lumber Company v. Columbia River Gorge Commission, et al*, 975 F.2d 616 (9th Cir. 1992). None of these decisions squarely address the issue raised by DLX. The holding in *Citadel Corp*, for example, was merely a restatement of the First Circuit's holding in *Pamel Corp. v. Puerto Rico Highway Authority*, 621 F.2d 33 (1st Cir. 1980) that no damage actions against any governmental entities (even municipalities) stemming from land use policies are cognizable in federal court. The proper remedy in the First Circuit then was a voiding of the offending regulation, never the award of damages. The circuit court of appeals in *Robinson, supra*, disposed of the Eleventh Amendment issue in only three sentences. In *Kenedy Memorial Foundation, supra*, the plaintiff conceded that his takings claim could not be asserted in federal court. *Id.* at 670. The court was not required, consequently, to engage in any discussion of the interplay between the Fifth and Eleventh Amendments. Similarly, the plaintiff in *Broughton* apparently conceded that the Eleventh Amendment generally bars Fifth Amendment takings claims and argued only that Congress had abrogated

the states' immunity (by approval of the Columbia River Gorge Compact) and that the states had waived immunity.[6]

The Fifth Amendment's Takings Clause is Self-Executing:

The Sixth Circuit is mistaken about the implications of a finding that the Takings Clause is "self-executing." DLX has no federal takings claim against Kentucky in any court, state or federal, after *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989)[7], unless the Fifth Amendment Takings Clause is self-executing.[8] However, the Fifth Amendment Takings Clause is self-executing and, because it is, the rights and remedies expressly created by the clause can be enforced in federal court. Rights granted by the Takings Clause have at least equal dignity with other Fourteenth Amendment compensation remedies enforced against the states in federal courts under acts of Congress adopted pursuant to § 5 of the Fourteenth Amendment. See, for example, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). This Court has not relegated Fifth Amendment takings claims against states to state courts.

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[6] Of course, DLX believes that the plaintiffs in *Kenedy Memorial Foundation* and *Broughton* conceded too much.

[7] This Court there affirmed the dismissal by the Michigan Supreme Court of the constitutional claims of Mr. Will, holding that "neither a State nor its officials acting in their official capacities are "persons" under § 1983." *Will, supra*, at 71. The effect of the Court's decision there was to hold that the Constitutional rights asserted by Mr. Will were not "self-executing." (Mr. Will claimed that he had been denied a promotion because his brother was a student activist. *Id.* at 60.)

[8] Kentucky is not a "person" within the meaning of 42 U.S.C. § 1983, and Congress has adopted no other statute pursuant to §5 of the Fourteenth Amendment which grants to private parties a Fifth Amendment compensation remedy against the states.

The Takings Clause was first applied to the states through the Fourteenth Amendment in *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1987). The Takings Clause was the first Bill of Rights provision to be expressly found applicable to the states. Erwin Chemerinsky, *Constitutional Law Principles and Policies* § 8.4.1 (2d ed. 2002). The opinion of the Court, by Justice Harlan, contains a survey of the cases and other authorities standing for the propositions that compensation for public taking of private property is a "vital principle of republican institutions" and that "in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen." *Id.* at 235-236. This Court went on to hold:

> In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument.

Id. at 241. It is true that *Chicago B. & Q. R. Co.* was an appeal from the Illinois Supreme Court, and not a takings case initiated in the first instance in federal district court; and it is also true that the defendant in the case was the City of Chicago and not the state of Illinois. But there is no hint in the case that Justice Harlan thought that the enforcement of the requirement for just compensation depended on an act of Congress adopted pursuant to §5 of the Fourteenth Amendment.

More recently, this Court has indicated that, when the government takes possession of private property without paying for it, the property owner's right to compensation "derives from the self-executing character of the constitutional provision . . . ." *First English Evangelical Lutheran Church v. Los Angeles*, 482 U. S. 304, 107 S. Ct. 2378, 96 L.Ed. 250 (1987). 482 U.S. at 315. In footnote nine of the opinion, the Court addressed the issue in the following way:

> The Solicitor General urges that the prohibitory nature of the Fifth Amendment, combined with principles of sovereign immunity, establishes that the Amendment itself is only a limitation on the power of the Government to act, not a remedial provision. **The cases cited in the text, we think, refute the argument of the United States that "the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government."** Brief for United States as Amicus Curiae 14. Though arising in various factual and jurisdictional settings, these cases make clear that **it is the Constitution that dictates the remedy for interference with property rights amounting to a taking.**

Id. at 316. n. 9 (emphasis supplied).[9]

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[9] This Court has also held that (at least in certain circumstances) the due process clause of the Fourteenth Amendment is self-executing, authorizing, by its own terms, a monetary claim against the states. *Reich v. Collins*, 513 U. S. 106, 109-110 (1994) ("A denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment," *Carpenter, supra,*

The decisions of this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448, 150 L.Ed.2d 592 (2001) (both involving Takings Clause claims against states or state agencies) rest on the implicit assumption that the Takings Clause is self-executing. There is no indication in either of those opinions that either the state defendants or the dissenting Justices thought the takings claims should be dismissed because Congress has not expressly provided (pursuant to § 5 of the Fourteenth Amendment) that Takings Clause plaintiffs may recover just compensation from states.

Chicago, B. & Q. R. Co., Nollan, and Palazzolo were all cases in which the federal takings case was first brought in state court, but all were grounded on the assumption that the Takings Clause is self-executing. If the Takings Clause is not self-executing, Fifth Amendment takings claims could not have been prosecuted even in state courts. *Will v. Michigan, supra*. *First English* holds explicitly that the Takings Clause is self-executing. The analysis of whether the clause is or is not self-executing is not dependant on or even necessarily related to an analysis of the reach of the Eleventh Amendment.

Fifth Amendment Rights Can Be Enforced In Federal Court.

The Takings Clause of the Fifth Amendment has been made applicable to the states through the Fourteenth Amendment.[10] Since it is clear that the Takings Clause is self-

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280 U.S., at 369, 50 S.Ct. at 123, the sovereign immunity States traditionally enjoy in their own courts notwithstanding.")

[10] Chicago B. & Q. R., supra.

executing, it necessarily follows that the Eleventh Amendment does not bar takings claims against states in federal court – because the Fourteenth Amendment by its terms imposes limits on state sovereignty and the Takings Clause by its terms specifies that compensation must be paid. Whatever takings immunity the states may have once enjoyed was surrendered with the adoption of the Fourteenth Amendment.[11] Justice Harlan in *Chicago B. & Q. R., supra*, quoted favorably from the opinion of Justice Jackson, while circuit judge, in *Scott v. Toledo*, 36 F. 385, 395, 396 (Circuit Court, N.D. Ohio, 1888):

> Whatever may have been the power of the states on this subject prior to the adoption of the fourteenth amendment to the constitution, it seems clear that, since that amendment went into effect, such limitations and restraints have been placed upon their power in dealing with individual rights that the states cannot now lawfully appropriate private property for the public benefit or to public uses without compensation to the owner, and that any attempt so to do, whether done in pursuance of a constitutional provision or legislative enactment, whether done by the legislature itself or under delegated authority by one of the subordinate agencies of the state, and whether done directly, by taking the property of one person and vesting it in another or the public, or indirectly, through the forms of law, by appropriating the

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[11] The states did not universally enjoy immunity from takings claims even before the adoption of the Fourteenth Amendment. *See*, Justice Harlan's survey of takings law in *Chicago B. & Q. R., supra,* at 237-238; *see, also* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity,* 77 Harv. L. Rev. 1 (1963).

> property and requiring the owner thereof to compensate himself, or to refund to another the compensation to which he is entitled, would be wanting in that 'due process of law' required by said amendment. The conclusion of the court on this question is that, since the adoption of the fourteenth amendment, compensation for private property taken for public uses constitutes an essential element in 'due process of law,' and that without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the federal constitution.

Chicago B. & Q. R., supra, at 238-239.

The court of appeals opinion suggests that the academic community has been supportive of expansion of the Supreme Court's Eleventh Amendment jurisprudence, or at least understands it to require that Fifth Amendment claims be relegated exclusively to the state courts.[12] That is a misunderstanding of the authorities. See, for example, Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1, 72-104 (1988), one of the authorities cited by DLX and referenced in the panel opinion. Professor Jackson believes that sovereign

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[12] "... DLX points to commentators who have suggested the question remains open....[Citations omitted.] But closer examination of each of these authorities reveals that they are concerned not with abrogating the states' Eleventh Amendment immunity in *federal* court, but with noting that the Fifth Amendment's requirement of just compensation forces the states to provide a judicial remedy in their *own* courts." *DLX v. Kentucky*, *supra*, at 527. (App.B, pp.30a-31a) Emphasis in original.

immunity is required by the Eleventh Amendment text only in diversity cases, but that sovereign immunity can and should be developed as a matter of federal common law. Nevertheless, she has this to say about sovereign immunity in the context of constitutional compensation claims:

> The remedial preference described above [a preference for injunctive and not monetary relief], regarded as a form of federal common law, clearly must yield where the supremacy of constitutional law requires a remedy normally disfavored in the doctrine. The Fifth Amendment is just such a provision and illustrates the point. The Court has recently held that the just compensation requirement of that clause is a 'self-executing' command to provide for the payment of compensation for any governmental taking. Does the state's sovereign immunity from suit in federal court foreclose those courts from requiring states to provide compensation if the state fails to provide an adequate opportunity for the adjudication of those claims?
>
> For a court otherwise having jurisdiction of the claim to answer that question affirmatively would be inconsistent with the basic command of Marbury that the court must apply the Constitution as law where it is controlling in cases properly before the court. Where the Constitution provides a self-executing command to a state to make payment, and where no other effective forum exists where the claim can be presented, it is fundamentally inconsistent with the predicate of a constitutional system to invoke a nonconstitutional tradition of sovereign immunity to defeat the claim. Indeed, the very clarity of this textual provision for a monetary remedy is inconsistent with a premise of sovereign immunity as a constitutional

> doctrine, at least as a doctrine separate and apart from whatever constraints on jurisdiction Congress may impose on the federal courts.

Jackson, supra, at 115-116. (Emphasis supplied.)

It is clear that Congress may abrogate the states' Eleventh Amendment immunity from damage suits in federal court pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment. *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). It makes no sense to think that the states' Eleventh Amendment immunity can remain intact in those few instances in which the language of the Constitution is so clear or the rights so important that a remedy exists against the states without the necessity of Congress acting. The Takings Clause of the Fifth Amendment is applicable to the states because this Court has determined that "compensation for private property taken for public uses constitutes an essential element in 'due process of law'." *Chicago B. & Q. R. Co., supra*, at 239. As a fundamental, self-executing part of the Fourteenth Amendment, the remedy mandated by the Takings Clause must surely abrogate the states' Eleventh Amendment immunity. The Takings Clause must have as much dignity, and as great an entitlement to federal jurisdiction, as any other remedy mandated by Congress pursuant to its exercise of its authority under § 5 of the Fourteenth Amendment (damages against states for violations of the Family Medical Leave Act, for example, see *Nevada Department of Human Resources v. Hibbs, supra*). This Court has not yet said expressly that federal takings claims against the states can be prosecuted in

federal courts, but that is the logical extension of its Fifth, Eleventh and Fourteenth Amendment jurisprudence. [13]

CONCLUSION

This Court should grant the petition, reverse the decision of the Sixth Circuit, and rule that DLX's takings claim is not barred by the Eleventh Amendment.

Respectfully submitted:

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Dated January 25, 2005

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[13] It should be noted, in addition, that some of the principal concerns of sovereign immunity advocates, that the state treasury might be swamped by private claims or that private claims would compete with public claims for state resources, for example, are not implicated in a takings case. A takings case requires the state only to pay for something it has taken. The state's wealth is increased by the value of the thing taken and reduced by a takings verdict in the same amount. The state experiences no net loss from the takings award, but the private claimant is relieved of the obligation to contribute his property, disproportionately, to the public good.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03-5528

[Filed October 28, 2004]

DLX, INC., Plaintiff-Appellant,	)
v.	)
COMMONWEALTH OF KENTUCKY, ET AL., Defendant-Appellee.	)

BEFORE: SILER, MOORE, and BALDOCK,* Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of

* Hon. Bobby R. Baldock, Senior United States Circuit Judge for the Tenth Circuit Court of Appeals, sitting by designation.

this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03-5528

[Filed August 26, 2004]

DLX, Inc.,
Plaintiff-Appellant,

v.

Commonwealth of Kentucky, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Kentucky at Pikeville
No. 02-00164
David L. Bunning, District Judge

Before: SILER, MOORE, and BALDOCK, Circuit Judges.*

* The Honorable Bobby R. Baldock, Circuit Judge of the United States Court of Appeals for the Tenth Circuit, sitting by designation.

OPINION

KAREN NELSON MOORE, Circuit Judge. Plaintiff-Appellant DLX, Inc. ("DLX") appeals from the dismissal of its § 1983 action against Defendants-Appellees the Commonwealth of Kentucky, the Kentucky Natural Resources and Environmental Protection Cabinet ("Cabinet"), and James E. Bickford, Secretary of the Cabinet, in his official capacity (collectively, "Kentucky"), alleging a taking of its property without just compensation in violation of the Fifth Amendment. The district court dismissed the complaint on Kentucky's Federal Rule of Civil Procedure 12(b)(1) motion, for lack of subject matter jurisdiction, on the basis of ripeness and the *Rooker-Feldman* doctrine. Although both of these grounds were inapposite, we sustain this dismissal on different reasoning, because the Eleventh Amendment bars DLX's claims against Kentucky in federal court. The district court's dismissal is therefore **AFFIRMED.**

I. BACKGROUND

The Lilley Cornett Woods ("Woods"), in Letcher County, Kentucky, is a tract of land owned by the state and maintained by Eastern Kentucky University as a wildlife refuge and research facility. The Woods are designated a National Natural Landmark as "[p]robably the only surviving virgin tract of any size in the Cumberland Mountains section of the mixed mesophytic forest, which is characterized by a great variety of tree species." National Park Service, *National Registry of Natural Landmarks*, http://www.nature.nps.gov/nnl/Registry/USA_Map/States/Kentucky/nnl/lcw/index.htm. The surface rights to the Woods were originally purchased by Kentucky from the Kentucky River Coal Company, which retained the mining rights; a portion of the property was also purchased from the Cornett heirs. In 1975, the South-East

Coal Company obtained a lease from the Kentucky River Coal Company to mine coal, including coal under the Woods, pursuant to which South-East acquired a permit from the state to mine 3,000 acres. Immediately before filing the amendment to South-East's then-existing permit that is at issue in this case, South-East filed for bankruptcy. DLX purchased all of South-East's assets, including the leases with Kentucky River and the state permit. At that point, DLX had a lease and permit allowing it to mine approximately 3,000 acres, which did not include any mining under the Woods. All the coal remaining in the lease is either under the Woods or can only be accessed by DLX through the land under the Woods.

DLX applied for Amendment No. 3 to the existing permit, which proposed an additional 130 aeres to be added to the 3,000-acre permit area. DLX submitted an initial plan to the Cabinet, which responded with a "deficiency letter." DLX resubmitted, adding "a pillar design for subsidence control." Joint Appendix ("J.A.") at 73 (Hearing Officer's Report and Recommendation). After additional deficiency letters, a seventy-five-foot vertical cover between mine operations and the surface was proposed in a third submittal; further deficiency letters resulted in a fourth submittal which left a 250-foot vertical cover, and proposed a fifty-percent recovery, that is, that half the coal in the area was extractable under the plan. No deficiency letter was issued by the Cabinet, but DLX in reassessing its fourth submittal decided that the proposal was unfeasible, and that a 250-foot cover would result in only twenty-five-percent recovery. DLX therefore withdrew its fourth proposal, submitting a fifth proposal instead which provided for fifty-percent recovery, but only a 110-foot vertical cover. This proposal was submitted with a letter requesting that the permit be issued or denied "as is." J.A. at 73 (Report). On April 25, 1994, the application was denied, for six reasons: the potential danger

to the old-growth forest portion of the Woods; a failure to demonstrate that the mining operation could be feasibly accomplished under 405 KAR 8:010 § 14(2); that the application did not contain sufficient geological and hydrologic information to demonstrate the hydrologic consequences of the project on the Woods; that it did not present information detailing the care the applicant would take to minimize hydrologic consequences; that there was inadequate information regarding the surrounding nature habitats; and there was no information on the minimization of the impact of mining on those habitats. DLX petitioned for review, and at the hearing, the reasons for denial of the application were distilled to one: "The application for the Permit (Amendment No. 3) was acceptable to the Cabinet except for the failure of the Petitioner to agree to a minimum cover (i.e., distance from mining to the surface) of greater than 110 feet." J.A. at 75 (Report).

The Hearing Officer of the Cabinet affirmed the decision of the Cabinet to deny the permit, finding both that the Cabinet could provide extra protection for the old-growth portion of the Woods that is not required for second-growth forests and that the Cabinet had a sufficient basis for determining that the 110-foot vertical cover proposed by petitioner was inadequate to minimize the impact to the hydrologic balance of the Woods. Noting that the petitioner bore the burdens of production and persuasion, the officer concluded that DLX failed to carry its burden of showing "that a 110-foot vertical cover would minimize disturbances to the hydrologic balance within the old-growth portion of the Lilley Cornett Woods." J.A. at 93 (Report). This report was adopted by then-Secretary Phillip J. Shepherd without comment.

Although Kentucky law allows a permit applicant to seek judicial review of a Secretary's final Order under KRS § 350.0305, DLX immediately filed a state-court takings claim, asserting that the denial of a permit to mine under the Woods constituted a regulatory taking of its property in violation of the Kentucky constitution. DLX expressly reserved its federal claims, noting,

> **RESERVATION OF FEDERAL CLAIMS**
>
> DLX hereby reserves its Federal claims. DLX will pursue in Federal court any remedies it may have under the United States Constitution or under United States statutes or regulations.

J.A. at 67 (State Ct. 1st Am. Compl.). After the state trial court dismissed the case for lack of ripeness, an intermediate court reversed, and the Supreme Court of Kentucky granted the Cabinet's petition for review. *See Commonwealth v. DLX, Inc.*, 42 S.W. 3d 624, 625 (Ky. 2001). That court decided the case on the basis of exhaustion of administrative remedies, rather than ripeness. *See id.* ("We conclude that DLX failed to exhaust its administrative remedies."). Because DLX had not appealed the Secretary's final order before filing a takings claim, it could not proceed on the state constitutional takings claim. *Id.* at 626-27. Two justices (of seven) dissented, noting that DLX was prevented from raising its constitutional claims in the administrative proceedings, and that it would have been prevented from doing so in its appeal from the decision of the Cabinet. *Id.* at 627 (Wintersheimer, J., dissenting). As the decision was one of state law only, a writ of certiorari from the United States Supreme Court was not sought.

One year after the Kentucky Supreme Court dismissed DLX's state constitutional claim, DLX filed in federal district

court, alleging a violation of the Fifth Amendment actionable under 42 U.S.C. § 1983. Kentucky immediately moved for dismissal under Federal Rule of Civil Procedure 12(b)(1), arguing that the court lacked subject matter jurisdiction under the doctrine of sovereign immunity of the Eleventh Amendment, the doctrine of ripeness, the doctrine of exhaustion, the *Rooker-Feldman* doctrine, and res judicata. The district court granted the motion on March 24, 2003, on the basis of ripeness and the *Rooker-Feldman* doctrine.

II. ANALYSIS

A. Standard of Review

A Rule 12(b)(1) motion can either attack the claim of jurisdiction on its face, in which case all allegations of the plaintiff must be considered as true, or it can attack the factual basis for jurisdiction, in which case the trial court must weigh the evidence and the plaintiff bears the burden of proving that jurisdiction exists. *See RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1133-35 (6th Cir. 1996); *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994); *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). As the district court made essentially no factual findings in deciding it that lacked jurisdiction, we will treat this as a "facial" 12(b)(1) motion. We review a motion to dismiss under Rule 12(b)(1) de novo where it requires no fact-finding. *See COB Clearinghouse Corp. v. Aetna United States Healthcare, Inc.*, 362 F.3d 877, 880 (6th Cir. 2004); *RMI*, 78 F.3d at 1135 (in factual attack, district court's factual findings are reviewed for clear error).

B. *Rooker-Feldman*

The *Rooker-Feldman* doctrine, named for *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923), and *District of Columbia Court of Appeals 6v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983), stands for the proposition that a party aggrieved by a state-court decision cannot appeal that decision to a district court, but must instead petition for a writ of certiorari from the United States Supreme Court. This circuit has devised a number of formulae for determining when a district court lacks jurisdiction under the *Rooker-Feldman* doctrine; broken down to essentials, there are two categories of cases barred by the doctrine. First, when the federal courts are asked to "engage in appellate review of state court proceedings," the doctrine necessarily applies. *Peterson Novelties, Inc. v. City of Berkley*, 305 F.3d 386, 390 (6th Cir. 2002). In determining when a plaintiff asks for appellate review, we have in the past looked to the relief sought, *see Dubuc v. Mich. Bd. of Law Exam'rs*, 342 F.3d 610, 618-19 (6th Cir. 2003), or asked the question whether the plaintiff alleges "that the state court's judgment actively caused him injury [rather than] that the judgment merely failed to redress a preexisting injury," *Pieper v. Am. Arbitration Ass'n, Inc.*, 336 F.3d 458, 461 n.1 (6th Cir. 2003). *See also Hutcherson v. Lauderdale County*, 326 F.3d 747, 755 (6th Cir. 2003) ("'[T]he fundamental and appropriate question to ask is whether the injury alleged by the federal plaintiff resulted from the state court judgment itself or is distinct from that judgment.'" (quoting *Garry v. Geils*, 82 F.3d 1362, 1365 (7th Cir. 1996)); *Tropf v. Fid. Nat'l Title Ins. Co.*, 289 F.3d 929, 937 (6th Cir. 2002) (The doctrine "precludes federal court jurisdiction where the claim is a specific grievance that the law was invalidly — even unconstitutionally — applied in the plaintiff's particular case." (internal quotation marks and citations omitted)).

The second category of cases barred by *Rooker-Feldman* is those which allege an injury that predates a state-court determination, but present issues inextricably intertwined with the claim asserted in the prior state court proceeding. Adopting Justice Marshall's phrasing in *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 25, 107 S. Ct. 1519, 95 L. Ed. 2d 1 (1987) (Marshall, J., concurring), this circuit has held,

> The federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment.

Peterson Novelties, 305 F.3d at 391. *See, e.g., Anderson v. Charter Township of Ypsilanti*, 266 F.3d 487, 492-94 (6th Cir. 2001) (applying "inextricably intertwined" test to hold *Rooker-Feldman* abstention appropriate).[1]

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[1] We note that two recent cases of this court have attempted to adopt the Seventh Circuit's division between *Rooker-Feldman* abstention and preclusion law, casting aside the *Pennzoil* inextricably-intertwined formulation to the extent that it operates to forbid subsequent litigation of issues already decided by a state court where the injury alleged in federal court predates the state proceeding. *See Stemler v. Florence*, 350 F.3d 578, 588-89 (6th Cir. 2003) ("As [plaintiff] is not directly challenging the state court's judgments in federal court, the doctrines of claim and issue preclusion are more properly applied to this case."); *Hood v. Keller*, 341 F.3d 593, 597-599 (6th Cir. 2003) (reversing district court's application of the *Rooker-Feldman* doctrine where plaintiff had raised facial and as-applied constitutional challenges in prior

DLX's claim is of the second type: the injury alleged is the permit denial that predates the state-court proceedings, not the state-court decision itself, and the relief that DLX requests is monetary. Therefore, the doctrine bars jurisdiction only to the extent that the district court must determine that the state court decided an issue wrongly in order for DLX's claim to succeed. Here, the state court decided that administrative exhaustion was a necessary component of a state constitutional takings claim; that although certain exceptions applied to that requirement, DLX met none of them; and that DLX had failed to exhaust administratively its claims. *See DLX*, 42 S.W.3d at 624-26. As administrative exhaustion is explicitly not a component of a federal takings claim,[2] the

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state-court criminal proceeding without applying *Pennzoil* formulation). Whatever the advisability of such a move, it is clearly foreclosed by prior cases of this court requiring the dismissal of claims that involve an injury predating the state-court proceedings on the exclusive grounds that the issues that the federal court would have to decide are inextricably intertwined with the state-court decision, in that to allow relief would require the conclusion that the state court had wrongly decided the issues before it. *See Peterson Novelties, Inc. v. City of Berkley*, 305 F.3d 386, 390-93 (6th Cir. 2002).

[2] The concurrence reads the Kentucky Supreme Court's opinion as applying *Williamson County* prong-one ripeness; we respectfully disagree with this interpretation of the state court's opinion. Although "prong-one" ripeness under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 186-91, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), is a requirement under Kentucky law, the Kentucky Supreme Court did not rest its decision on that ground. While the Kentucky trial court "granted the Cabinet's motion for judgment on the pleadings on grounds that the case was not ripe for judicial determination and that DLX failed to exhaust its administrative remedies," the Kentucky Supreme

district court could have concluded that DLX had established a regulatory taking of its property under the Fifth Amendment and was entitled to relief without undermining any of the state court's conclusions. Indeed, as discussed below, the Supreme Court in *Williamson County Regional Planning Commission*

Court concluded only "that DLX failed to exhaust its administrative remedies." *Commonwealth v. DLX, Inc.*, 42 S.W.3d 624, 625 (Ky. 2001). Although the Kentucky Supreme Court in *DLX* cited to *Williamson County*'s language regarding "prong-one" ripeness, it clearly did so to bolster its exhaustion decision, noting that the *Williamson County* Court "explained the exhaustion of administrative remedies requirement in taking cases thusly" in introducing the quotation. *Id.* at 626. Finally, in summing up its holding, the Kentucky Supreme Court made clear the grounds for its decision:

> The Court of Appeals erred in holding that making an unconstitutional-as-applied challenge in an administrative proceeding creates an exemption to the exhaustion-of-remedies requirement. Therefore, we reverse the Court of Appeals and hold that DLX's failure to exhaust its administrative remedies by failing to appeal the Secretary's order, deprived the Franklin Circuit Court of subject-matter jurisdiction to hear DLX's takings claim.

Id. at 627. Because administrative exhaustion is explicitly not a component of a federal takings claim under *Williamson County*, 473 U.S. at 194 n.13 ("Exhaustion of review procedures is not required."), the district court could have concluded that DLX had made out a regulatory taking of its property under the Fifth Amendment and was entitled to relief without undermining any of the state court's conclusions. DLX's federal takings claim and its state takings claim are not "indistinguishable," as the concurrence asserts, for this reason: the federal claim does not require administrative exhaustion, where the state claim does. *Rooker-Feldman* is thus inapplicable in this case.

v. Hamilton Bank, 473 U.S. 172, 195-97, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), clearly contemplates that after a state just-compensation proceeding, a federal-court action will be filed.[3] *Rooker-Feldman* is inapplicable here.

C. *Williamson County* Prong-Two Ripeness and Administrative Exhaustion

Williamson County, 473 U.S. at 186-91, 194-96, sets out two requirements for a federal regulatory-takings claim to be ripe. First, a plaintiff must demonstrate that the decisionmaking body has come to a "final" decision, allowing the federal courts to assess how much use of the property is allowed and therefore whether the regulatory decision amounts to a taking. *Id.* at 186-91. This has become known

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[3] If DLX had in fact been allowed in the state courts to reach the merits of its takings claim and then lost, it is likely that the formula adopted by this circuit as applied in our past cases would require *Rooker-Feldman* abstention, in evident tension with *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 195-97, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), which clearly contemplates that a takings plaintiff who loses her claim in state court will have a day in federal court. The catch-22 of the "*Williamson* trap" discussed below with respect to res judicata is also evident with respect to the *Rooker-Feldman* doctrine. We do not need to confront these tensions in this case, however, and express no opinion as to the resolution of this conflict. To the extent that recent cases of this court indicate a recognition that the "inextricably intertwined" prong of *Rooker-Feldman* may be doing the work that res judicata law should do, an *England* reservation may be sufficient to defeat a *Rooker-Feldman* argument where the *England* reservation would defeat claim preclusion. *See Ivy Club v. Edwards*, 943 F.2d 270, 284 (3d Cir. 1991) (*England* reservation sufficient to defeat *Rooker-Feldman* as well as res judicata after *Pullman* abstention).

as "prong-one ripeness," and will be discussed in more detail below, as an issue of fact remains as to whether DLX satisfies prong-one ripeness. The district court, however, apparently relied on prong-two ripeness, which requires that a plaintiff "seek compensation through the procedures the State has provided for doing so." *Id.* at 194. This refers only to an action for just compensation or inverse or reverse condemnation, but *not* to review procedures. "Exhaustion of review procedures is not required." *Id.* at 194 n.13. That administrative exhaustion is not required is part of the general rule that exhaustion is never required in § 1983 suits. *See Patsy v. Fla. Bd. of Regents*, 457 U.S. 496, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982). Finality, however, is required, so that the federal court can assess the scope of the taking; an inverse-condemnation action is required, because no violation of the Fifth Amendment attaches until a plaintiff "has used the procedure and been denied just compensation," *Williamson County*, 473 U.S. at 195; but administrative exhaustion is not required.

Kentucky argues on appeal that despite this clear language from *Williamson County*, an exhaustion requirement still applies. Kentucky cites to a number of Kentucky state cases, two district court cases, and a Federal Circuit case in which the plaintiff apparently never satisfied *Williamson County* prong-one ripeness, in never having pursued a permit. This sparse precedent is unavailing in the face of clear Supreme Court precedent that exhaustion is never required in a § 1983 case (except pursuant to Congressional reform) and that there is no exception for takings claims. *Williamson County*, 473 U.S. at 193, 194 n.13.

The district court apparently held that because the state-court action was dismissed on the basis of a lack of jurisdiction, "DLX has not yet been denied just

compensation." J.A. at 407 (D. Ct. Op. at 10). But DLX has been denied just compensation in a state suit; it sought compensation and none was awarded. That the decision was not "on the merits" in the strictest sense does not mitigate DLX's injury; its property has allegedly been taken through the denial of its permit application, and an attempt to remedy that injury in the state court has been defeated by a rule of state law. DLX has no more remedy to seek in state court; the time for application for review of the Cabinet's decision is long past, and any state-court action it files will be dismissed for want of exhaustion. DLX has been denied a federal right through the operation of a state procedural rule without analogue in federal law, and its complaint is ripe.

In its brief, Kentucky attempts to defend this aspect of the district court's holding by arguing that DLX is precluded from arguing "that it has pursued its state condemnation remedy *or* that the state condemnation remedy was inadequate, because it did not invoke it correctly." Appellees' Br. at 24. But *Williamson County* is clearly concerned with ripeness, not with giving state decisionmakers adequate opportunity to right a wrong. This is demonstrated by the *Williamson County* Court's staunch refusal to require administrative exhaustion. "Remedial procedures" are not required by *Williamson County*, because the value isn't allowing state decisionmakers to arrive at a decision, but instead is ensuring that an injury has actually occurred. DLX has not received just compensation in a state action for the same; its federal claim is ripe under *Williamson County* prong two. *See Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283 (4th Cir. 1998) (even where plaintiff made bad-faith effort in state court, "no clear basis under *Williamson County* to determine that [the] takings claim is other than finally ripe for adjudication in a federal forum.").

D. Res Judicata and *England* Reservation[4]

The availability of federal courts to hear federal constitutional takings claims has often seemed illusory, because under *Williamson County* takings plaintiffs must first file in state court, as DLX did, before filing a federal claim, and because in deciding that federal claim, preclusive effect must be given to that prior state-court action under 28 U.S.C. § 1738 according to the res judicata[5] law of the state, including the doctrines of merger and bar whereby all claims which could have been brought in an earlier cause of action are precluded. *See* Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U. J. L. & Pol'y 99 (2000). Kentucky state law applies res judicata to bar not just asserted claims, but all claims which should have been raised in prior litigation. "[I]t has long been recognized that a party may not split its cause of action, therefore, if a cause of action should have been presented and the party failed to do so and the matter should again arise in another action, it will be held that the first action was res adjudicata as to all causes that should have properly been presented." *Newman v. Newman*, 451 S.W.2d 417, 419 (Ky.

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[4] Although res judicata is not jurisdictional but an affirmative defense, it would form an independent basis for disposing of the case were it held to apply, and both parties have extensively briefed the issue.

[5] Most of the decisions use the terms "issue preclusion" and "claim preclusion" rather than "collateral estoppel" and "res judicata," to avoid confusion of the use of "res judicata" to mean the entire body of preclusion law with its narrow use as a synonym for "claim preclusion." In this opinion, we will use "res judicata" to refer to both the doctrines of claim preclusion and issue preclusion, and we will use those latter terms whenever possible.

1970). Therefore, because DLX could have brought its federal constitutional claim in state court, argues Kentucky, that claim is now barred by the operation of claim preclusion.[6] *See Migra v. Warren City Sch. Dist. Bd. of*

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[6] Although *Newman v. Newman*, 451 S.W.2d 417, 419 (Ky. 1970), has been the law in Kentucky since its issuance and continues to be cited by Kentucky state courts for the proposition that claims which should have been brought in the first proceeding are subject to claim preclusion, *see, e.g., Whittaker v. Cecil*, 69 S.W.3d 69, 72 (Ky. 2002), this court has not consistently hewn to that principle. *Compare Stemler v. Florence*, 350 F.3d 578, 588 (6th Cir. 2003) (relying on *Yeoman v. Commonwealth Health Policy Bd.*, 983 S.W.2d 459, 464-65, 45 13 Ky. L. Summary 36 (Ky. 1998), and *Barnes v. McDowell*, 848 F.2d 725, 730-31 (6th Cir. 1988), in allowing federal constitutional substantive due process claim to go forward despite previous state-court wrongful-death action arising from same set of facts) *with Donovan v. Thames*, 105 F.3d 291, 295 (6th Cir. 1997) ("Under Kentucky law, res judicata, or claim preclusion, 'may be used to preclude entire claims that were brought or should have been brought in a prior action. . . " (quoting *City of Covington v. Bd. of Trs. of the Policemen's and Firefighters' Ret. Fund*, 903 S.W.2d 517, 521, 42 05 Ky. L. Summary 29 (Ky. 1995)) and *Consol. Television Cable Serv., Inc. v. City of Frankfort*, 857 F.2d 354, 357 (6th Cir. 1988) (rejecting claims that "could have been raised in the prior litigation" under the authority of *Newman* and *Vinson v. Campbell County Fiscal Ct.*, 820 F.2d 194, 197 (6th Cir. 1987)). *Yeoman*, 983 S.W.2d at 465, cited by *Stemler*, requires that for "claim preclusion to apply, the subject matter of the subsequent suit must be identical," and cites to *Newman* for the proposition that "there must be identity of the causes of action" for claim preclusion to apply. The key paragraph in *Newman* reads as follows:

> The general rule for determining the question of res adjudicata as between parties in actions embraces several conditions. First, there must be identity of parties. Second,

there must be identity of the two causes of action. Third, the action must be decided upon its merits. In short, the rule of res adjudicata does not act as a bar if there are different issues or the questions of law presented are different. Likewise, it has long been recognized that a party may not split his cause of action, therefore, if a cause of action should have been presented and the party failed to do so and the matter should again arise in another action, *it will be held that the first action was res adjudicata as to all causes that should have properly been presented.* We stated the rule in *Hays v. Sturgill*, 302 Ky. 31, 193 S.W.2d 648, as follows:

> "The rule that issues which have been once litigated cannot be the subject matter of later action is not only salutary but necessary in the administration of justice. The subsidiary rule that one may not split up his cause of action and have it tried piecemeal rests upon the same foundation. To permit it would not be just to the adverse party or fair to the courts. So, as said in *Combs v. Prestonsburg Water Co.*, 260 Ky. 169, 84 S.W.2d 15, 18: 'The rule is elementary that, when a matter is in litigation, parties are required to bring forward their whole case; and "the plea of res judicata applies not only to the points upon which the court was required by the parties to form an opinion and pronounce judgment, *but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.*"'"

451 S.W.2d at 419 (first emphasis added). The error in *Stemler* thus seems to be in following *Newman*'s formulation of the general rule of res judicata without noting the additional rule against claim-splitting. However this tangle of case law is to be resolved, it seems likely that even under *Stemler*'s erroneous reading of Kentucky's

Educ., 465 U.S. 75, 85, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984) (state-court judgments have claim-preclusive effects in § 1983 actions, barring constitutional claims not brought in prior state-court contract action). Of course, given *Williamson County*'s ripeness requirements, DLX could not have chosen to file a federal-court action first encompassing both its state and federal claims; therefore, the interaction of *Williamson County*'s ripeness requirements and the doctrine of claim preclusion could possibly operate to keep every regulatory-takings claimant out of federal court.[7] Even if only issue preclusion is held to be operative against plaintiffs who ripen under *Williamson County*, most plaintiffs could still be barred from the federal courthouse, as the state constitutional takings claim will often overlap substantially with the federal claim. As DLX was in fact prevented from litigating all the issues in its state takings claim which would have affected its federal takings claim, it only needs to overcome claim preclusion to

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res judicata rules, a state takings claim and a federal takings claim would be identical in both "subject matter" and "cause of action" for the purpose of claim-preclusion law.

[7] Although this would not apply where a plaintiff could demonstrate that the procedures offered by the state are clearly inadequate, the distinction between a state cause of action and a cause of action in the state courts is troublesome. The Supreme Court has held that the Fifth Amendment Takings Clause is a self-executing remedy in state courts, *see First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315-16, 107 S. Ct. 2378 & n.9, 96 L. Ed. 2d 250 (1987), so the "inadequate" remedy might be either the refusal of the state court to recognize that remedy, which would likely be redressable in the first instance through a petition for a writ of certiorari in the United States Supreme Court, or instead the more narrow inadequacy of having no promulgated state law providing a remedy. *See Kruse v. Village of Chagrin Falls*, 74 F.3d 694, 698-700 (6th Cir. 1996).

litigate its federal claim, but this is unusual in these cases. The barring of the federal courthouse door to takings litigants seems an unanticipated effect of *Williamson County*, and one which is unique to the takings context, as other § 1983 plaintiffs do not have the requirement of filing prior state-court actions; reading *Williamson County*, the expectation is that an unsuccessful state plaintiff will then return to federal court.

A number of circuits have addressed this problem in a number of different contexts. Some plaintiffs have in fact litigated their federal claims in state court, and wish to avoid issue preclusion that they feel is unfair. Others chose not to litigate their federal claims in state court, and some in doing so made an explicit reservation of their federal claims to federal court, as DLX did. The courts of appeals have responded in various ways, but no court has held that where a plaintiff reserves its federal claims in an *England* reservation, named for *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964), and does not litigate them in the state courts, that *claim* preclusion will operate to bar a federal-court action. *England* concerned an action originally filed in the federal district court, which had invoked *Pullman* abstention in refusing to hear the claim. After the state courts rendered a decision adverse to the plaintiffs, which resolved both the state-law issues that the district court's abstention was directed towards and the federal claims that had been submitted unreservedly by the plaintiffs to the state courts, the plaintiffs returned to federal court to attempt to resuscitate their federal action. 375 U.S. at 414. The district court granted defendants' motion to dismiss on the basis of res judicata. The Supreme Court reversed, noting, "There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal

constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims." *Id.* at 415. "[A] party may readily forestall any conclusion that he has elected not to return to the District Court . . . by making on the state record the 'reservation to the disposition of the entire case by the state courts' . . . . When the reservation has been made, . . . his right to return will in all events be preserved." *Id.* at 421-22 (citations omitted). Some courts have held that a plaintiff in state court for the sole purpose of ripening his claims under *Williamson County*'s second prong is in state court involuntarily, and therefore can make an "*England* reservation" of his federal takings claims for federal disposition.

While Kentucky cites three cases for the proposition that res judicata applies regardless of the need to ripen under *Williamson County*, closer examination of these cases reveals that none requires that claim preclusion apply where, as here, plaintiffs have made an *England* reservation of their federal claims. In *Wilkinson v. Pitkin County Board of County Commissioners*, 142 F.3d 1319 (10th Cir. 1998), the court noted first that the "plaintiffs asserted federal claims in the state court proceedings, which were fully adjudicated." *Id.* at 1324. Therefore, both issue preclusion *and* claim preclusion would have operated to bar the plaintiff's claim in *Wilkinson*. The court then refused to decide "whether it is possible to reserve a federal claim, or, if so, what must be done to reserve such a claim, because at no time did plaintiffs attempt to do so." *Id.* at 1324-25. In *Palomar v. Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362, 363 (9th Cir. 1993), again, the plaintiff had asserted its federal claims in state court, and no attempt at reservation was made. Finally, in *Peduto v. City of North Wildwood*, 878 F.2d 725 (3d Cir. 1989), the plaintiffs asserted their federal claims in state

court, and again made no attempt to reserve their claims. *Id.* at 726-27, 729 n.5. *See also Rainey Bros. Constr. Co. v. Memphis & Shelby County Bd. of Adjustment*, 967 F. Supp. 998, 1004 n.5 (W.D. Tenn. 1997) (res judicata applies where plaintiff brought federal claims in state court; because plaintiff made no reservation, court "expressly declines whether such a reservation would be effective."), *aff'd*, 1999 U.S. App. LEXIS 7237, 1999 WL 220128 (6th Cir. Apr. 5, 1999).

Indeed, the Ninth Circuit in cases since *Palomar* has indicated that the reach of that case may be confined to *issue* preclusion, rather than *claim* preclusion, where a reservation has been made. *See San Remo Hotel v. San Francisco*, 364 F.3d 1088, 1094 (9th Cir. 2004) ("The City does not dispute that the plaintiffs' *England* reservation was sufficient to avoid the doctrine of *claim* preclusion" but issue preclusion still applies); *Macri v. King County*, 126 F.3d 1125, 1130 (9th Cir. 1997) (reservation is possible, preventing operation of res judicata);[8] *Dodd v. Hood River County* [*Dodd I*], 59 F.3d 852, 862 (9th Cir. 1995) (implicit consent by defendants to claim-splitting and reservation by state courts sufficient to reserve the claim for federal determination; issue preclusion still applies). Other circuits have also indicated that at least claim preclusion can be barred by an *England*-style reservation. *See Kottschade v. City of Rochester*, 319 F.3d 1038, 1041-42 (8th Cir. 2003) ("The suggestion that [an *England* reservation might prevent res judicata] has the virtue of logic and is tempting," but is premature in an initial

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[8] *Macri* seems possibly to misread earlier Ninth Circuit precedent in holding that neither issue nor claim preclusion applies, in direct conflict with *Dodd I* and *Dodd II*, *Dodd v. Hood River County*, 136 F.3d 1219, 1222 (9th Cir. 1998). The more recent *San Remo* case seems to indicate that the issue/claim preclusion split will be the law in the Ninth Circuit.

federal-court action that is unripe under *Williamson County*); *Front Royal*, 135 F.3d at 283 (*England* reservation appropriate in *Williamson County* ripeness trap); *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1306 (11th Cir. 1992) (*Williamson County* litigants "qualify for the exception to generally applicable res judicata principles"). The Second Circuit has even gone so far as to hold explicitly that *issue* preclusion does not apply where a reservation has been made in the state-court litigation necessary to ripen a takings claim under *Williamson County*. *See Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118, 130 (2d Cir. 2003). *See also Barnes v. McDowell*, 848 F.2d 725, 732 (6th Cir. 1988) (party who files in state court before filing in federal court, splitting claims, enjoys *England* protection from res judicata even without explicit reservation);[9] *Wicker v. Bd. of Educ.*, 826 F.2d 442, 446 (6th Cir. 1987) (party who files in state court subsequent to federal court but before abstention order still entitled to *England* reservation).

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[9] This prior Sixth Circuit precedent rebuts the concurrence's suggestion that *England* reservation only applies in a case where a party reserves federal questions in state court following federal court abstention. The plaintiff in *Barnes v. McDowell*, 848 F.2d 725, 732 (6th Cir. 1988), had not even reserved his federal claims in state court, but "[b]y splitting on his own initiative the state and federal actions stemming from his discharge, Barnes achieved the very same effect that he would have had he made an *England* reservation." In the takings realm, where *Williamson County* prong-two ripeness combined with res judicata law would otherwise bar all federal takings claimants from the door of the district court—a result clearly not contemplated by the Court in *Williamson County*—this sort of extension of *England* to unwilling state court litigants is necessary to avoid grave unfairness.

The weight of circuit-level authority is therefore clearly in favor of allowing DLX's *England*-style reservation in its Kentucky state-court action to prevent the application of the doctrine of claim preclusion in its subsequent federal-court takings action. We join our sister circuits in holding that a party's *England* reservation of federal takings claims in a state takings action will suffice to defeat claim preclusion in a subsequent federal action. It is unnecessary to decide in this case whether or not the Second Circuit's holding in *Santini* that issue preclusion is also inapplicable is the better rule, because the Kentucky Supreme Court did not decide any issues that affect DLX's right to recovery on its federal claim. Therefore, the doctrine of res judicata does not bar DLX's federal takings claim.[10]

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[10] One final note on ripeness: We have recognized in the past that res judicata is clearly inapplicable as to claims that were unripe at the time of a prior court proceeding, *see Katt v. Dykhouse*, 983 F.2d 690, 691 (6th Cir. 1992), and this might seem to operate to save DLX's federal claims, *see Buckles v. Columbus Mun. Airport Auth.*, 90 Fed. Appx. 927, 2004 WL 346045, *3 n.1 (6th Cir. 2004), but this conclusion misunderstands the nature of ripeness. Although *Williamson County* speaks broadly in terms of when the federal right of action ripens, prong-two ripeness does not necessarily operate to bar the litigation of a federal claim in the state courts because ripeness is a doctrine governing justiciability in the *federal* courts, pursuant to Article III or prudential concerns. *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION §§ 2.1, 2.4 (3d ed. 1999). This is borne out by the number of cases where plaintiffs assert federal claims in the state courts contemporaneous with or even instead of their state constitutional claims. *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992) (reviewing state-court decision on federal takings claim). Our question is whether or not the Kentucky state court would have heard DLX's federal takings claim or dismissed it as unripe, and whether or not

E. *Williamson County* Prong-One Ripeness

As noted above, *Williamson County*'s first ripeness requirement for federal regulatory takings claims in federal court is that the state or local decisionmakers have made a final decision, such that a federal court assessing whether or not a taking has occurred can look to that decision in assessing what use can be made of the property. *Williamson County,* 473 U.S. at 186-91. Kentucky vigorously asserts that DLX has not adequately demonstrated a final decision on the part of the Cabinet; DLX equally vigorously asserts that in fact a final decision has been made. The parties focus their attention on the amount of vertical cover required by the Cabinet: DLX argues that the Cabinet is immovably settled on a 250-foot vertical cover; Kentucky argues that some amount of vertical cover between 110 feet and 250 feet may be acceptable to the Cabinet.

Williamson County itself concerned a developer's application for a construction permit from the local planning commission. In 1973, a predecessor in interest to the plaintiff had submitted a preliminary design to the commission, which was approved; the design was continuously reapproved during development and construction, even after the zoning laws changed, through 1980. A final plan was submitted in 1980,

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DLX's federal claim would have been ripe in the Kentucky state court is a question that must be adjudged with respect to Kentucky ripeness law. It appears that the only ripeness requirement imposed by the Kentucky courts on federal takings claims is one equivalent to *Williamson County* prong-one ripeness. *See Spanish Cove Sanitation, Inc. v. Louisville-Jefferson County Metro. Sewer Dist.*, 72 S.W.3d 918, 921 (Ky. 2002). Therefore, if DLX's federal takings claim is ripe in federal court now, it was ripe in state court at the time of the state-court litigation.

which was disapproved by the Commission; after a change in ownership, revised plans were submitted, which were also disapproved. These decisions were held not to be final by the Court, however, because variances could be sought for "five of the Commission's eight objections to the" plan. *Id.* at 188. Until those variances were sought and rejected, the takings claim was not yet ripe. The next Term, the Court applied the ripeness requirement again in *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 352, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986), holding that a developer who had only submitted one proposal that had been rejected did not have a ripe takings claim, noting, "Rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." *Id.* at 353 n.9. But three subsequent Supreme Court decisions found *Williamson County* ripeness. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1013 & n.3, 112 S. Ct. 2886 & n.3, 120 L. Ed. 2d 798 (1992), the Court, over dissent, held that because the governing body stipulated that no permit would have been issued, the claim was not unjusticiable under *Williamson County*. In *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997), the Court noted that the requirement "responds to the high degree of discretion characteristically possessed by land use boards in softening the strictures of the general regulations they administer," *id.* at 738, in the course of holding that because in the instant case, the agency had no discretion over whether the plaintiff would be allowed to use her land, "no occasion exists for applying *Williamson County*'s requirement." *Id.* at 739. Finally, in *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001), in finding a regulatory taking in a state's refusal to allow a landowner to develop wetlands property, the Court rejected a suggestion that "while the Council rejected petitioner's effort to fill all of the

wetlands, and then rejected his proposal to fill 11 of the wetland acres, perhaps an application to fill (for instance) 5 acres would have been approved." *Id.* at 619. In doing so, the Court examined the rejection of both proposals, studying the grounds relied upon, and determined that no development would be permitted: "Further permit applications were not necessary to establish this point." *Id.* at 621. Thus, *Williamson County* prong-one ripeness is a factual determination, taking into account all relevant statutes, ordinances, and regulations, that the decisionmaker has arrived at a final determination with respect to the permit applicant's use of her property, and that that determination is one which will allow a court to determine whether a regulatory taking has taken place. This circuit has also recognized a "futility exception," which is in substance similar to *Palazzolo*'s rule, whereby a plaintiff need not seek a variance from a regulation where it would be an "idle and futile act"; the exception only applies where a landowner has "submitted at least one meaningful application for a variance." *Bannum, Inc. v. City of Louisville*, 958 F.2d 1354, 1363 (6th Cir. 1992) (internal citations and quotation marks omitted); *see also Seguin v. City of Sterling Heights*, 968 F.2d 584, 587-88 (6th Cir. 1992) (refusing to decide whether futility exists).

DLX argues that its application for a permit providing less than 250 feet of vertical cover would have been futile, and points to testimony elicited during the administrative hearing from the Cabinet reviewer, Larry Peterson ("Peterson"). Kentucky responds that Peterson's testimony actually reveals that the officer might have been willing to approve less vertical cover, if DLX had submitted additional data supporting such a move. It seems at first blush that Kentucky has the better of this argument — DLX's futility argument is based on a mischaracterization of Peterson's testimony, and

examining that testimony reveals that he would have been receptive to a permit application stipulating less vertical cover accompanied by additional data:

> Q. So it is fair to say, isn't it, that if your concern was connection of the pressure dome fractures to the maximum stress relief fractures that no permit less than 250 feet would have been acceptable?
>
> . . .
>
> A. Unless they demonstrated through some other data, which they were given opportunity to do, that the fractures weren't that deep or my concerns weren't that justified, yes.
> Q. But based on the data that you did have?
> A. Yes.
> Q. We have been all through that. The data that you did have, including the data that said most of the water moved within 100 feet of the surface, based on the data that you did have, it is fair to say that you would not have approved a permit that left only a 240-foot vertical cover, isn't it?
> A. Yes.

J.A. at 359 (Tr. of Admin. Hr'g). In its reply brief, DLX argues that no previous case requires a plaintiff to submit scientific surveys before finality will be found, and asserts that DLX could have proven no set of scientific facts that would have convinced the decisionmaker to allow DLX's permit.

Because resolution of this question requires factual inquiry, and the question is one on which the district court did not pass, we decline to resolve this factual question on appeal. Assuming all of DLX's allegations in its federal complaint to be true, namely, "The actions of the Commonwealth rendered

more than one million tons of high quality coal unmineable," J.A. at 7 (Compl. ¶ 14), jurisdiction exists; to deny jursidiction based on a factual attack seems inappropriate without further proceedings below. We therefore choose to rely on Eleventh Amendment immunity in affirming the district court.[11]

F. Eleventh Amendment Immunity

Finally, Kentucky[12] argues that it is immune from § 1983 suit under the Eleventh Amendment[13] as 42 U.S.C. § 1983

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[11] Although we would normally decline to decide the constitutional question — whether Eleventh Amendment immunity protects a state against a federal takings claim in a federal court — in favor of the factual question, *see, e.g., Adams v. City of Battle Creek*, 250 F.3d 980, 986 (6th Cir. 2001) (citing *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347, 56 S. Ct. 466, 80 L. Ed. 688 (1936) (Brandeis, J., concurring)), we believe the procedural posture of this case mandates that, rather than subject the parties to further litigation on an ultimately irrelevant issue, we affirm the district court on this ground.

[12] There is no dispute that each defendant — Kentucky, the Cabinet, and Secretary Bickford — is "the state" for the purposes of determining their susceptibility to suit.

[13] "Eleventh Amendment immunity is an issue of jurisdiction, but the issue is no longer classified as simply a question of subject matter jurisdiction." *Ernst v. Roberts*, No. 02-2287, 379 F.3d 373, 2004 U.S. App. LEXIS 16581, *8, 2004 WL 1792631, *3 n.4 (6th Cir. Aug. 12, 2004). Therefore, a motion under Rule 12(b)(1) to dismiss for lack of subject matter jurisdiction may not be procedurally correct, but all that is required to properly raise this "affirmative defense to jurisdiction" is a motion citing to "the

does not abrogate its immunity. *See Quern v. Jordan*, 440 U.S. 332, 338-41, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979) (reaffirming *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974)). This is something of a mischaracterization of the applicable law; "[t]he barrier [is] not . . . Eleventh Amendment immunity . . . . The stopper [is] that § 1983 creates no remedy against a State." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997). Treating DLX's claim as a self-executing reverse condemnation claim, however, we conclude that the Eleventh Amendment's grant of immunity protects Kentucky from that claim as well. The Supreme Court has explicitly stated that just compensation "is, like ordinary money damages, a compensatory remedy . . . [and therefore] legal relief," and moreover, that a federal-court suit alleging a taking seeks "not just compensation *per se* but rather damages for the unconstitutional denial of such compensation," *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 710-11, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999); therefore, the *Ex Parte Young* exception is inapplicable. In response, DLX points to commentators who have suggested the question remains open,[14] relying on dicta

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Eleventh Amendment itself." 2004 U.S. App. LEXIS 16581, *9, [WL] *3, *15.

[14] DLX also argues that our decision in *Arnett v. Myers*, 281 F.3d 552 (6th Cir. 2002), is binding precedent that the Eleventh Amendment is no bar to a Fifth Amendment claim against a state in federal court, and that if the Eleventh Amendment does not prevent the Supreme Court from hearing such cases as *Palazzolo v. Rhode Island*, 533 U.S. 606, 619-26, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001), on certiorari from state courts, it does not prevent a suit in the district court against a state. Both of these arguments lack merit. In *Arnett*, the plaintiffs clearly only sought declaratory and

in two Supreme Court takings cases, *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987), and *City of Monterey*, 526 U.S. at 714 (1999) (Kennedy, J., plurality opinion) ("Even if the sovereign immunity rationale retains its vitality in cases where [the Fifth] Amendment is applicable, *cf. First English* . . ."). *See, e.g.* RICHARD H. FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM [hereinafter HART & WECHSLER], at 379 & n.32 (4th ed. 1996), Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1, 115 & nn.453-54 (1988); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885, 981 & n.351 (2000); Carlos Manuel Vásquez, *What is Eleventh Amendment Immunity?*, 106 Yale L.J. 1683, 1709 & n.119-21 (1997).

But closer examination of each of these authorities reveals that they are concerned not with abrogating the states' Eleventh Amendment immunity in *federal* court, but with noting that the Fifth Amendment's requirement of just compensation forces the states to provide a judicial remedy in their *own* courts. "[T]he Constitution mandates the availability of effective remedies for 'takings' and for the coercive

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injunctive relief, thus allowing the case under the *Ex Parte Young* exception. As for DLX's second contention, "It was long ago settled that a writ of error to review the final judgment of a state court, even when a State is a formal party [defendant] and is successful in the inferior court, is not a suit within the meaning of the Amendment." *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 27, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990) (quoting *General Oil Co. v. Crain*, 209 U.S. 211, 233, 28 S. Ct. 475, 52 L. Ed. 754 (1908) (Harlan, J., concurring)) (alteration in original).

collection of taxes, and accordingly requires courts to provide those remedies, 'the sovereign immunity States traditionally enjoy in their own courts notwithstanding.'" HART & WECHSLER, supra, at 379 (quoting *Reich v. Collins,* 513 U.S. 106, 110, 130 L. Ed. 2d 454, 115 S. Ct. 547 (1994)). *Reich* explicitly holds that the requirement of a remedy for unconstitutional taxes does not trump "the sovereign immunity States enjoy in *federal* court, under the Eleventh Amendment." 513 U.S. at 110. *First English* makes clear that the Fifth Amendment Takings Clause is a self-executing remedy, notwithstanding sovereign immunity. *See* 482 U.S. at 316 n.9. Therefore, had DLX brought a federal claim with its state claim in state court, the Kentucky courts would have had to hear that federal claim, and likely could not have required exhaustion as a prerequisite to hearing the federal claim, *see Felder v. Casey*, 487 U.S 131, 146-47, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988), but this court is powerless to hear it. *See John G. & Marie Stella Kenedy Mem'l Found. v. Mauro,* 21 F.3d 667, 674 (5th Cir. 1994) (Eleventh Amendment bars Fifth Amendment inverse condemnation claim brought in federal district court); *Robinson v. Ga. Dep't of Transp.*, 966 F.2d 637 (11th Cir. 1992) (same); *Broughton Lumber Co. v. Columbia River Gorge Comm'n*, 975 F.2d 616, 618-20 (9th Cir. 1992) (same); *Citadel Corp. v. Puerto Rico Highway Auth.*, 695 F.2d 31, 33 n.4 (1st Cir. 1982) (same); *Garrett v. Illinois*, 612 F.2d 1038, 1040-41 (7th Cir. 1980) (takings claim filed in federal court against the state barred by Eleventh Amendment).

Although *Alden v. Maine*, 527 U.S. 706, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999), might seem to foreclose the requirement that states be susceptible to suit in their own courts on takings claims, a close reading of *Alden* reveals that it would present no bar to such a claim. In *Alden*, the Court held only "that the powers delegated to Congress under

Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." *Id.* at 712. The *Alden* Court specifically preserved *Reich*'s promise of a state-court remedy, noting, "The obligation arises from the Constitution itself; *Reich* does not speak to the power of Congress to subject States to suits in their own courts." *Id.* at 740. Thus, where the Constitution requires a particular remedy, such as through the Due Process Clause for the tax monies at issue in *Reich*, or through the Takings Clause as indicated in *First English*, the state is required to provide that remedy in its own courts, notwithstanding sovereign immunity. *See SDDS, Inc. v. State*, 2002 SD 90, 650 N.W.2d 1, 8-9 (S.D. 2002) ("South Dakota's sovereign immunity is not a bar to SDDS's Fifth Amendment takings claim."); *Boise Cascade Corp. v. Oregon*, 164 Ore. App. 114, 991 P.2d 563, 565-69 (Or. 1999) (relying on *First English* in holding that "at least some constitutional claims are actionable against a state, even without a waiver or congressional abrogation of sovereign immunity, due to the nature of the constitutional provision involved"). *But see Manning v. Mining & Minerals Div. of the Energy, Minerals, & Natural Res. Dep't*, 2004-NMCA-52, ¶ 4-¶ 12, 90 P.3d 506 (Ct. App. 2004) (rejecting *Boise Cascade*), *cert. granted*, No. 28,500, 2004-NMCERT-005 (May 11, 2004).

III. CONCLUSION

Because Kentucky enjoys sovereign immunity in the federal courts from DLX's federal takings claim, the district court was correct to dismiss the DLX's complaint for want of jurisdiction. The judgment of the district court is therefore **AFFIRMED**.

CONCURRENCE

BALDOCK, Circuit Judge, concurring. I respectfully concur in the Court's judgment of dismissal only. Although the Court's Eleventh Amendment analysis appears sound, in my opinion we need not reach the Eleventh Amendment question. Rather, the Kentucky Supreme Court's decision implicates the *Rooker-Feldman* doctrine thereby precluding the necessity of resolving the myriad of issues raised in this case. In the alternative, because the "*England*-reservation" doctrine is inapplicable, res judicata bars DLX's federal takings claim. I will discuss each issue in turn.

I.

Under the *Rooker-Feldman* doctrine, lower federal courts do not have jurisdiction to review state court decisions; only the United States Supreme Court has jurisdiction to correct state court judgments. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16, 44 S. Ct. 149, 68 L. Ed. 362 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983).[1] The

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[1] The Supreme Court's lack of jurisdiction to review the Kentucky Supreme Court's judgment in this case as a result of DLX's failure to raise its federal claims in state court is not fatal to

Rooker-Feldman doctrine deprives lower federal courts of jurisdiction to engage in appellate review of state court decisions or to adjudicate federal claims that are "inextricably intertwined" with a state court judgment. *See Peterson Novelties, Inc. v. City of Berkley*, 305 F.3d 386, 390 (6th Cir. 2002). A federal claim is "inextricably intertwined" with a state court judgment when the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 25, 107 S. Ct. 1519 95 L. Ed. 2d 1 (1987) (Marshall, J., concurring); *Anderson v. Charter Township of Ypsilanti*, 266 F.3d 487, 492 (6th Cir. 2001).

In this case, DLX's federal takings claim is "inextricably intertwined" with the Kentucky state court judgment. Specifically, the Kentucky Supreme Court dismissed DLX's state takings claim for want of jurisdiction based on its application of federal law; namely, the standards set forth in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985). *See Commonwealth v. DLX, Inc.*, 42 S.W.3d 624, 627 (Ky. 2001). DLX then filed a federal takings claim in district court. To ensure DLX's takings claim was ripe for review, the district court, like the Kentucky Supreme Court, applied the Supreme Court's two-prong ripeness test from *Williamson*. Under *Williamson*, a Fifth Amendment takings claim is not ripe for review until (1) the government entity charged with implementing the regulations has reached a final decision inflicting an actual, concrete injury, *and* (2) if a State

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the application of *Rooker-Feldman*. *See Feldman*, 460 U.S. at 484 n.16 ("By failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state-court decision in any federal court.").

provides an adequate procedure for seeking just compensation, the property owner has used the procedure and been denied just compensation. 473 U.S. at 193-95. The ripeness test is conjunctive: both prongs must be satisfied.

Accordingly, the district court first sought to determine whether a final decision inflicting an actual, concrete injury existed under prong one. The district court indicated, however, a close reading of the Kentucky Supreme Court opinion revealed that the court had already decided *Williamson* prong one and determined no final decision, and thus no injury existed. *See DLX, Inc.*, 42 S.W.3d at 626-27. In my opinion, the district court properly read the Kentucky Supreme Court's opinion. In *DLX, Inc.*, the Kentucky Supreme Court dismissed DLX's state takings claim for lack of subject matter jurisdiction. *See id.* at 627. The court reasoned the state agency had not yet arrived at a final, definitive position inflicting an injury because DLX failed to exhaust its administrative remedies. *See id.* The Kentucky Supreme Court relied upon the *Williamson* decision to reach its conclusion that no final decision inflicting an injury existed. *See id.* at 626-27. The Kentucky Supreme Court explained that "until a statute has been applied, there can be no unconstitutional application . . .[and] it is the administrative action which determines the extent, if any, of the constitutional injury." *Id.* at 626. Immediately thereafter, the court noted "the United States Supreme Court addressed *this same issue* in [*Williamson*]." *Id.* (emphasis added). The court then quoted *Williamson*'s first prong at length:

> Our reluctance to examine taking claims until such a *final decision* has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause. Although the question of what constitutes a taking for purposes of the Fifth

> Amendment has proved to be a problem of considerable difficulty, . . . the Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations . . . . Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

Id. (quoting *Williamson*, 473 U.S. at 190-91) (emphasis added) (internal quotation and citation omitted).

The district court, after considering the Kentucky Supreme Court's analysis, reasonably concluded *Rooker-Feldman* applied. The district court reasoned it would have to review the Kentucky Supreme Court's conclusion that DLX did not have a final decision, and hold the opposite, in order to satisfy *Williamson*'s first prong. While the Kentucky Supreme Court appears to have commingled two distinct doctrines (i.e., exhaustion and finality), *see Williamson*, 473 U.S. at 192, I nevertheless agree with the district court's conclusion that the Kentucky Supreme Court's decision implicates the *Rooker-Feldman* doctrine because the Kentucky Supreme Court decided *Williamson* prong one and indicated it lacked jurisdiction over DLX's takings claim based on the lack of a final decision.[2] *See DLX, Inc.*, 42 S.W.3d at 626-27.

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[2] The Court in this case correctly notes that the Kentucky Supreme Court based its holding on the failure to exhaust administrative remedies, *see DLX, Inc.*, 42 S.W.3d at 627, but that exhaustion is "not a component of a federal takings claim." *See*

The district court thus would have had to reapply *Williamson* and conclude the Kentucky Supreme Court "got it wrong," *see Anderson*, 266 F.3d at 492, to proceed any further in its analysis. In other words, under *Williamson*'s first prong, the district court was required to determine whether a final decision imposing an injury existed. The Kentucky Supreme Court, however, had already determined no such decision or injury had occurred. Thus, the only way DLX could assert a successful federal takings claim was for the district court to rule contrary to the Kentucky Supreme Court. *Rooker-Feldman* bars such federal review of state court judgments.

The Court in this case attempts to avoid *Rooker-Feldman* by distinguishing between DLX's state and federal takings claims. *See* Court's Op. at 8. The Court's analysis does not persuade me, however, because the claims are indistinguishable. *See Anderson*, 266 F.3d at 495 (holding *Rooker-Feldman* barred jurisdiction because the requirements of the state takings clause were indistinguishable from the requirements of the Fifth Amendment Takings Clause). As in *Anderson*, little, if any, substantive difference exists between the requirements of the Kentucky Takings Clause, *see* Ky. Const. § 242, and the Fifth Amendment Takings Clause in this case. In fact, the Kentucky Supreme Court has relied upon Supreme Court precedent interpreting the Fifth Amendment Takings Clause to determine what constitutes a

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Court's Op. at 8. That the Kentucky Supreme Court may have misapplied *Williamson*, however, is of no moment. The purpose of *Rooker-Feldman* is to preclude lower federal courts from telling state courts they conducted an incorrect analysis or reached the wrong conclusion. *See Gottfried v. Medical Planning Servs.*, 142 F.3d 326, 330 (6th Cir. 1998) (noting only the Supreme Court has jurisdiction to correct state court judgments); *see also* 28 U.S.C. § 1257.

taking under Kentucky law. *See Commonwealth v. Stearns Coal and Lumber Co.*, 678 S.W.2d 378, 381 (Ky. 1984). Moreover, the Court in this case notes a state takings claim and federal takings claim are nearly identical for purposes of claim preclusion law. *See* Court's Op. at 13 n.5; *see also id.* at 14 (noting state constitutional takings claim "overlap substantially" with federal takings claim). The Court also concedes *Rooker-Feldman* would likely apply if the Kentucky Supreme Court had reached the merits of DLX's state takings claim. *See id.* at 9 n.2. In the end, the crux of this case is DLX's allegation of *one* taking and *one* injury requiring just compensation. The Kentucky Supreme Court already determined, under *Williamson* prong one, no final decision existed, and thus, no taking or injury had occurred. For the district court to hold otherwise would violate *Rooker-Feldman*.

In sum, the case, in my opinion, should be dismissed under the *Rooker-Feldman* doctrine. The purpose of the *Rooker-Feldman* doctrine is to avoid duplicative appeals and proscribe lower federal courts review of state court decisions. Here, DLX availed itself of state procedures and cannot now take a second bite at the judicial apple in federal court.

II.

Aside from the *Rooker-Feldman* issue, I disagree with the Court's res judicata analysis and its application of the "*England* reservation" doctrine. *See* Court's Op. at 11.[3] As the Court correctly notes, DLX did not raise its federal takings claim in state court. Instead, DLX "reserved" its

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[3] Because the Court refers to both claim and issue preclusion as "res judicata," I do the same.

federal claim in its state complaint for later adjudication in federal court. *See id.* at 4. Res judicata normally bars such procedural tactics. *See Donovan v. Thames*, 105 F.3d 291, 295 (6th Cir. 1997) ("Under Kentucky law, res judicata, or claim preclusion, may be used to preclude entire claims that were brought *or should have been brought* in a prior action.") (emphasis added) (internal citation omitted). The Court, however, concludes DLX's purported reservation was proper under the principles established in *England v. Louisiana State Bd. of Med. Exam'r*, 375 U.S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964). I disagree because the Court expands the *England*-reservation doctrine beyond its intended scope.

In *England*, the plaintiffs *initially* sought to enjoin application of a state statute in federal court. The district court abstained to allow the state courts the opportunity to interpret the statute. *See England*, 375 U.S. at 413. The plaintiffs thereafter commenced state proceedings, but were unsuccessful. Upon returning to federal court, the plaintiffs revived their constitutional claims; however, the defendant argued the claims were precluded. The Supreme Court held preclusion did not bar the plaintiffs' federal claims because a party remitted to state court by *an abstention order* has the right to return to federal court. *See id.* at 415. Accordingly, under the *England*-reservation doctrine, a plaintiff who finds himself in state court involuntarily due to a district court's *abstention order* may, in certain circumstances, reserve his federal issues for later adjudication in federal court. *See id.* at 421-22.

The *England*-reservation doctrine thus applies only in a case where a party reserves federal questions in state court following federal court abstention. *See id.* at 421; *see also* Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 4471.1 at 247 (2002) (noting "[t]he core of

the England-reservation rule remains unscathed. A party who clearly reserves federal questions following 'Pullman' abstention . . . can return to federal court for decision of the federal issues, free of preclusion."). Moreover, in order for the *England*-reservation doctrine to apply, the federal action must be brought *first* "affording the federal court the opportunity to decide whether to abstain. A plaintiff who elects to go to state court first is likely to be precluded from a second federal action, even if an express reservation is attempted." Wright & Miller, *supra* § 4471.1 at 250. In *Allen v. McCurry*, 449 U.S. 90, 101-02 n.17, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980), the Supreme Court explained why an *England*-reservation is inapplicable to cases first filed in state court rather than federal court:

> The holding in *England* depended entirely on this Court's view of the purpose of abstention in such a case: Where a plaintiff properly invokes federal-court jurisdiction *in the first instance* on a federal claim, the federal court has a duty to accept that jurisdiction. Abstention may serve only to postpone, rather than to abdicate, jurisdiction, since its purpose is to determine whether resolution of the federal question is even necessary, or to obviate the risk of a federal court's erroneous construction of state law.

(emphasis added). The procedural posture of this case differs significantly from *England*. Here, DLX did not initially file its takings claim in federal court, but first filed its claim in state court. Therefore, a federal court never had the opportunity to abstain and thus, the *England*-reservation doctrine is inapplicable.

The Court unnecessarily attempts to expand the *England*-reservation doctrine beyond the scope of federal abstention in

this case. According to the Court, "given *Williamson County*'s ripeness requirements, DLX could not have chosen to file a federal-court action first; therefore, the interaction of *Williamson County*'s ripeness requirements and the doctrine of claim preclusion could possibly operate to keep every regulatory-takings claimant out of federal court." Court's Op. at 14. The Court then applies the *England*-reservation doctrine and, to avoid claim preclusion, declares "[t]he weight of circuit-level authority is therefore clearly in favor of allowing DLX's *England*-style reservation." *Id.* at 18.

To begin, the Court's conclusion that "every regulatory takings claimant" would be excluded from federal court is not entirely accurate. Takings claimants who properly raise their federal claims in state proceedings may seek review in the United States Supreme Court if dissatisfied with the results they obtain from state court. *See* 28 U.S.C. § 1257. Next, courts have generally rejected use of the *England*-reservation doctrine in the takings context and many courts have declined to create an exception rendering res judicata and collateral estoppel inapplicable in Fifth Amendment takings cases. *See* Wright & Miller, *supra* § 4471.1 at 253 (citing cases); *see also Santini v. Connecticut Hazardous Waste Mgmt. Serv.*, 342 F.3d 118, 128 (2d Cir. 2003) (citing cases). Discussing this issue, Wright & Miller reasons:

> The question whether filing a state action first waives the opportunity to reserve federal questions for federal adjudication is tested by situations in which rules other than abstention doctrine require a plaintiff to go first to state court. A clear illustration is provided by the [*Williamson*] rule that a regulatory taking claim is not ripe until the plaintiff has exhausted available state judicial compensation remedies. Attempted reservation of federal issues has been rejected, or at least frowned

> upon, perhaps because the purpose of this ripeness doctrine is to provide state courts an opportunity to supervise state regulatory practices.

See supra § 4471.1 at 253; *see also Wilkinson v. Pitkin County Bd.*, 142 F.3d 1319, 1325 n.4 (10th Cir. 1998) (noting concern that the ripeness requirement "may, in actuality, almost always result in preclusion of federal claims, regardless of whether reservation is permitted"); *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362, 364 (9th Cir. 1993) (explaining that mere fact that *Williamson* requires takings claimants to first file in state court "does not prevent the doctrine of res judicata from barring subsequent federal action"); *Peduto v. City of N. Wildwood*, 878 F.2d 725, 729 (3d Cir. 1989) (same); *Griffin v. Rhode Island*, 760 F.2d 359, 360 n.1 (1st Cir. 1985) (explaining *England*-reservation was inapplicable and that "section 1983 does not override state preclusion law by allowing plaintiffs to first proceed to judgment in state courts and then turn to federal courts for adjudication of federal claims."). In *Allen*, 449 U.S. at 104, the Supreme Court stated simply: "There is, in short, no reason to believe that Congress [through § 1983] intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged in at all."

Perhaps most importantly, allowing a claimant to reserve its federal takings claim in state proceedings undermines the very purpose of *Williamson*'s ripeness requirements. The ripeness requirements for federal takings claims stems from both Article III and the Fifth Amendment. *See Williamson*, 473 U.S. at 186-87, 190-91; *Arnett v. Myers*, 281 F.3d 552, 562 (6th Cir. 2002). The ripeness requirements are of

constitutional dimension because they assist in the determination of whether an injury has occurred for purposes of Article III's case or controversy requirement. *See Arnett*, 281 F.3d at 562. Further, the Fifth Amendment is a self-executing remedy in state courts and state compensation procedures are constitutionally required. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 316 n.9, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987). Based upon these antecedent precepts, *Williamson*'s ripeness test compels that a state court make a federal constitutional ruling because the very purpose of state compensation procedures is to address the federal constitutional question. Allowing the reservation of the federal question in state court would undermine the role, as the Supreme Court has described, of state courts in adjudicating federal takings claims. As one commentator explained:

> Some federal courts have suggested that a property owner can reserve the right to litigate federal issues in a federal forum under the doctrine of *England v. Louisiana State Board of Medical Examiners*, but this ought not to work. The England doctrine exists to further the purpose of federal abstention. . . . The doctrine, however, does not apply in the context of the Fifth Amendment which, as construed by the Supreme Court, requires state courts to rule on federal constitutional grounds.

Thomas E. Roberts, *Fifth Amendment Taking Claims in Federal Court*, 24 Urb. Law. 479, 480 (1992).

In sum, the Court erred in applying the *England*-reservation doctrine in this case. A plaintiff, in my view, simply cannot make an *England*-reservation in non-abstention cases. Instead, res judicata applies to bar DLX's federal

claim. We generally presume state courts are capable of adjudicating federal claims along with state claims. *See Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 85-86, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984); *see also Donovan*, 105 F.3d at 295. Moreover, the Supreme Court has clearly explained that states are required to adjudicate takings claims because, if a state provides just compensation, resort to a federal forum may be avoided. *See Williamson*, 473 U.S. at 194.[4]

Based on the foregoing, I respectfully concur only in the Court's judgment of dismissal.

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[4] One final note: After concluding *Rooker-Feldman* and res judicata do not apply, the Court engages in a *Williamson* ripeness analysis but does not resolve *Williamson* prong one. *See* Court's Op. at 22. I do not believe we have the luxury of sidestepping the ripeness issue. As the Court notes, ripeness is a justiciability doctrine partially rooted in Article III's case or controversy requirement. *See id.* at 19 n.8. Consequently, the doctrine raises threshold jurisdictional issues that may not be assumed. *See Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 94, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). Further, whether the Court can dismiss a potentially *unripe claim* under the Eleventh Amendment raises a difficult issue. The ripeness doctrine and the Eleventh Amendment both have jurisdictional bases; however, ripeness cannot be waived. *See Florida Ass'n of Rehab. Facilities, Inc. v. Florida Dep't of Health and Rehab. Serv.*, 225 F.3d 1208, 1227 n.14 (11th Cir. 2000). Thus, we should decide whether a claim is ripe before addressing the Eleventh Amendment. *See id.* (noting although [courts have] described the issue of Eleventh Amendment immunity as itself one of subject matter jurisdiction, "mootness-*like standing and ripeness* -raises an even more basic question of jurisdiction that cannot be waived and goes to the very heart of the 'case and controversy' requirement of Article III" that must be decided first.) (emphasis added) (internal citations omitted).

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 02-164-DLB

[Filed March 24, 2003]

DLX, INC.	)
PLAINTIFF	)
	)
v.	)
	)
COMMONWEALTH OF KENTUCKY, ET AL	)
DEFENDANTS	)
	)

MEMORANDUM OPINION & ORDER

Plaintiff DLX, Inc. alleges an unconstitutional taking and a violation of section 1983 arising out of the denial of an application to amend an existing coal mining permit by the Kentucky Natural Resources and Environmental Protection Cabinet ("Cabinet"). DLX has named the Commonwealth of Kentucky, the Cabinet, and James E. Bickfort, in his official capacity as Secretary of the Cabinet, as defendants. This matter is before the Court upon Defendants' motion to dismiss DLX's complaint. (Doc. # 5) Plaintiff having filed a

response, and Defendants having filed a reply, this matter is now ripe for review.

I. FACTUAL BACKGROUND

This disputes concerns an area known as the Lilly Cornett Woods ("the Woods") in Letcher County, Kentucky. (Doc. #8, 3) The Woods is considered by the Commonwealth to be National Natural Landmark and wildlife refuge. (Doc. #5, 3) Prior to 1969, the Woods was owned by the Cornett heirs and the Kentucky River Coal Corporation ("KRCC"). (Doc. #8, 3) In 1969, the Commonwealth purchased some of the surface rights from the Cornett heirs. (Id.) At the same time, by written agreement, KRCC gave the Commonwealth additional rights to the surface and also gave up its right to cut timber in the Woods. (Id.) The agreement expressly recognized the right of KRCC to mine coal so long as underground mining was conducted. (Id). DLX holds the right to mine 10,000 underground acres pursuant to a lease with KRCC. (Id.) DLX has a permit with the Cabinet to mine 3,000 of these acres. (Doc. #5, 3)

In 1994, DLX sought to amend its permit by adding an additional 130 acres to the existing permit. (Id. at 2-3) These 130 acres are located under or immediately adjacent to the Woods. (Id.) The permit application was the subject of an administrative proceeding, which included seven days of formal hearing. (Doc. #8, 5) Several revisions were made to the permit application, including one which would have left a 250-foot vertical cover. (Id. at 4) Defendants claim that the Cabinet was prepared to accept the application with this limitation. (Doc. #5, 4) However, DLX withdrew this proposal after it determined that it would not be economically feasible to mine the coal with this limit. (Doc. #8, 4) By letter, DLX reinstated its previous proposal, which included

a 110-foot limit. (Doc. #5, 4) Ultimately, the hearing officer recommended that the permit be denied. (Doc. #8, 5) The Secretary of the Cabinet adopted the hearing officer's report and recommendations, and entered a final order affirming the denial. (Id.) DLX did not appeal the final order of the Secretary. (Id.) Instead, DLX filed a claim in the Franklin County Circuit Court for just compensation under the takings clause of the Kentucky Constitution. (Id.) In its state complaint, DLX expressly reserved its federal constitutional claims. (Id.)

The circuit court dismissed DLX's claims because it found that under KRS § 350.0305 DLX was required to seek judicial review of the final order before bringing a claim for compensation under the Kentucky Constitution. (Id.) The Kentucky Court of Appeals reversed, but the Supreme Court of Kentucky reversed the court of appeals, holding that DLX's failure to exhaust administrative remedies by failing to appeal the Secretary's order deprived the trial court of subject matter jurisdiction to hear DLX's takings claim. *Commonwealth v. DLX, Inc.*, 42 S.W.3d 624, 627 (Ky. 2001).

II. ARGUMENTS OF THE PARTIES

Defendants contend that DLX's claims are barred by the Eleventh Amendment because they are entitled to sovereign immunity. Defendants also argue that this Court lacks subject matter jurisdiction because (1) DLX's takings claim is not ripe due to DLX's failure to allow the Cabinet to make its final review or decision; and (2) DLX failed to exhaust its administrative remedy by not appealing the Cabinet's final decision to the Franklin Circuit Court. In addition, Defendants argue that the DLX is precluded from relitigating its takings claim in federal court based on *res judicata*.

Defendants contend that DLX's state claims, which were adjudicated to the highest state court, are virtually identical to the federal claims now being raised. Defendants also argue that the *Rooker/Feldman* doctrine prohibits DLX from relitigating its takings claim in federal court. Defendants explain that this doctrine prevents lower federal courts from having jurisdiction to review a case which was adjudicated and decided by a state court because only the U.S. Supreme Court, upon petition for writ of *certiorari,* has jurisdiction to review and correct state court judgments. Finally, Defendants argue that DLX is prevented from bringing an action for trespass based on the doctrine of state sovereign immunity.

In response, DLX argues that the Supreme Court has never expressed the view that takings claims are barred by the Eleventh Amendment. DLX argues that its takings claim is ripe because the administrative agency reviewed five amended permit applications and made a final decision to reject it. DLX argues that it was not required to exhaust its administrative remedy by appealing to the Franklin Circuit Court, and even if Plaintiff was required to do so, that requirement was waived because such an appeal would have been futile. DLX argues that it is not barred from bringing its claims based on *res judicata* because it expressly reserved its federal claims in the complaint filed in the state court. DLX argues that its federal claims were not litigated in the state court. Moreover, DLX argues that its state claims were not actually litigated in the state court because its claims were not resolved on the merits. DLX argues that its claims are not barred by the *Rooker/Feldman* doctrine because (1) the facts and issues which were presented in the state court are not identical to the ones asserted in this Court, and (2) DLX is not asking this Court to review Kentucky law, but instead is making claims on federal law. Finally, DLX concedes that it

is barred by the Eleventh Amendment from bringing its trespass action.

III. ANALYSIS

The issue of ripeness must be addressed first because it is jurisdictional. *Pearson v. City of Grand Blanc,* 961 F.2d 1211, 1214 (6th Cir. 1992) (J. Bertelsman, sitting by designation); *see also Bigelow v. Michigan Dep't of Natural Res.,* 970 F.2d 154, 157 ("If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed"). The ripeness requirement in a taking case depends on the type of claim. *Pearson,* 961 F.2d at 1214-15. In *Pearson,* Judge Bertelsman explained that there are several different categories of claims: (1) just compensation taking (2) due process taking (3) substantive due process (4) equal protection; and (5) procedural due process, *Id.* at 1215-16, *citing Eide v. Sarasota County,* 908 F.2d 716, 720-22 (11th Cir.1990), *cert. denied,* 498 U.S. 1120 (1991) and *Executive 100, Inc. v. Martin County,* 922 F.2d 1536, 1540 (11th Cir.), *cert. denied,* 502 U.S. 810 (1991). In this case, DLX has alleged a just compensation takings claim, a due process takings claim, and a substantive due process claim.

In a "just compensation takings claim," the plaintiff claims that a government regulation applied to his land constitutes a taking of his property without just compensation in contravention of the Fifth Amendment. *Pearson,* 961 F.2d at 1215. The remedy sought is the just compensation. *Id.* In a "due process takings claim," the plaintiff claims that the regulation applied to his property goes too far and destroys the value of his property to such an extent that it amounts to a taking by eminent domain without due process of law. *Id.* at 1215-16. The remedy sought is invalidation of the regulation. *Id.* at 1216. In a "substantive due process claim,"

the plaintiff claims that the regulation is arbitrary and capricious in that it does not bear a substantial relation to the public health, safety, morals, or general welfare. *Id.*

DLX's due process takings claim and its substantive due process claim are to be distinguished from a procedural due process claim. A plaintiff can bring a section 1983 procedural due process claim by one of two methods: "(1) [by] demonstrating that he is deprived of property as a result of established state procedure that itself violates due process rights; or (2) by proving that the defendants deprived him of property pursuant to a 'random and unauthorized act' *and* that available state remedies would not adequately compensate for the loss." *Macene v. MJW, Inc.*, 951 F.2d 700, 706 (6th Cir.1991) (emphasis in original) (quoting Collins v. Nagle, 892 F.2d 489, 497 (6th Cir.1989)). Under the first element, the fundamental elements are notice and opportunity to be heard. *Yellow Freight Sys., Inc. v. Martin,* 954 F.2d 353, 357 (6th Cir. 1992). DLX has not alleged that it was deprived of notice or the opportunity to be heard. Under the second method, DLX has not alleged that there was a random or unauthorized act, or that a state remedy would not adequately compensate it for its loss.

In *Williamson County Regional Planning Commission v. Hamilton Bank,* the Supreme Court held that a taking claim is not ripe until (1) "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue;" and (2) "if a State provides an adequate procedure for seeking just compensation, the property owner. . . has used the procedure and been denied just compensation." 473 U.S. 172, 194-95 (1980). The Court stated that this finality requirement applied whether the claim was "analyzed as a deprivation of property without due process under the

Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment." *Id.* at 200. The Court explained that respondent's due process theory was that the regulation went "so far that it has the same effect as a taking by eminent domain" and "is an invalid exercise of the police power, violative of the Due Process Clause of the Fourteenth Amendment." 473 U.S. at 197. The Court found that respondent's claim was premature:

> Viewing a regulation that "goes too far" as an invalid exercise of the police power, rather than as a "taking" for which just compensation must be paid, does not resolve the difficult problem of how to define "too far," that is, how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession. As we have noted, resolution of that question depends, in significant part, upon an analysis of the effect the Commission's application of the zoning ordinance and subdivision regulations had on the value of respondent's property and investment-backed profit expectations. That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property.

Id. at 199-200.

However, in *Nasierowski Bros. Inv. Co. v. Sterling Heights,* the Sixth Circuit held that where a plaintiff does not allege an unconstitutional taking of his property under the Fifth and Fourteenth Amendments, but instead asserts that he or she was deprived of procedural due process, the "procedural due process claim is instantly cognizable in federal court without requiring a final decision. . . from the

responsible municipal agency." 949 F.2d 890, 893-94 (6th Cir. 1991).

In *Bigelow v. Michigan Dep't Natural Resources,* the Sixth Circuit repeated the rule from *Nasierowski,* stating that the final decision requirement does not apply to a "pure" claim of procedural due process, but explained that "[p]rocedural due process claims arising from an alleged taking may be subject to the same ripeness requirements as the taking claim itself depending on the circumstances of the case." 970 F.2d 154, 159 (6th Cir. 1992) (quoting Harris v. Riverside County, 904 F.2d 497, 500 (9th Cir. 1990)). The court found that the plaintiffs' procedural due process claim was ancillary to their just compensation claim, and therefore it was subject to a ripeness inquiry. *Id.* at 160. Otherwise, "addressing the plaintiffs' procedural due process claim at this stage of the proceedings would allow future plaintiffs effectively to circumvent the ripeness requirement for takings claims simply by attaching a procedural due process claim to their complaint." *Id.*

In dicta, the *Bigelow* court indicated that the *Williamson* finality requirement applies to substantive due process claims as well. *Id.* at 159 (citing Hoehne v. San Benito County, 870 F.2d 529, 532 (9th Cir.1989)).

In *Montgomery v. Carter County,* 226 F.3d 758 (6th Cir. 2000), the Sixth Circuit questioned the applicability of substantive and procedural due process claims in takings cases. The court stated that "[t]he justification for recognizing the denial of fair predeprivation procedures as a separate injury in takings cases is less than clear. . . . In takings cases, postdeprivation process is sufficient." *Id.* at 768-69. As to substantive due process claims, the court explained that "the Supreme Court has repeatedly cautioned that the concept of

substantive due process has no place when a provision of the Constitution directly addresses the type of illegal governmental conduct alleged by the plaintiff." *Id.* at 769 (citing Graham v. Connor, 490 U.S. 386, 394-95 (1989)). The court explained that the "takings clause itself addresses whether and under what circumstances the government may take an individual's private property, which is why a number of other circuits have concluded that no room is left for the concept of substantive due process." *Id.* However, the court concluded:

> In any event, whatever the applicability of the concepts of procedural and substantive due process to takings claims, we agree that those concepts may not be used in order to mount an end run around the ripeness requirements of *Williamson County*.

Id. at 769-70. The Sixth Circuit repeated this sentiment in a recent decision, stating that "[p]rocedural due process and equal protection claims that are ancillary to taking claims are subject to the same *Willamson* ripeness requirements." *Arnett v. Myers,* 281 F.3d 552, 562 (6th Cir. 2002).[5]

In summary, unless the plaintiff has alleged a "pure" due process violation, the plaintiff must meet the ripeness requirements of *Williamson*.

In the case *sub judice,* DLX has not alleged a "pure" due process violation. In Count I, DLX clearly states a claim for an unconstitutional taking and seeks just compensation. In Count II, DLX is stating a claim for a due process taking:

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[5] The Court did not address substantive due process claims because the plaintiffs had not made such a claim.

DLX claims that the restrictions on mining on its property go too far and destroy the value of its property to such an extent that it amounts to a taking by eminent domain without due process of law. The Supreme Court was clear in *Williamson* that the finality requirement applies to both of these claims. Under *Montgomery v. Carter County, supra,* DLX's substantive due process claim in Count III is also subject to the *Williamson* ripeness requirement. Therefore, DLX must show that (1) the Secretary has reached a final decision regarding the application of the regulations to its property; and (2) if Kentucky provides an adequate procedure for seeking just compensation, DLX has used the procedure and been denied just compensation.

First, the Secretary has reached a final decision regarding the application of the regulations. However, the concept of finality is not to be confused with the determination by the Kentucky Supreme Court that DLX has not exhausted its administrative remedies. *Commonwealth v. DLX, Inc.,* 42 S.W.3d 624, 627 (Ky. 2001). As the Supreme Court explained in *Williamson,*

> While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

473 U.S. at 193. The Kentucky Supreme Court held that none of the exceptions to the exhaustion requirement were applicable. 42 S.W.3d at 626. This Court cannot be called

upon to review the propriety of that decision. *Anderson v. Charter Township of Ypsilanti,* 266 F.3d 487, 492 (6th Cir. 2001) (explaining that under the *Rooker/Feldman* abstention doctrine "lower federal courts do not have jurisdiction to review a case litigated and decided in state court; only the United States Supreme Court has jurisdiction to correct state court judgments.") Because the federal claims asserted by DLX are identical to the claims adjudicated in state court, this Court lacks jurisdiction under the *Rooker/Feldman* doctrine.[6]

However, there has been no showing by DLX that Kentucky does not provide an adequate procedure for seeking just compensation. Moreover, DLX has not yet been denied just compensation because its state complaint was dismissed for lack of subject matter jurisdiction. "[B]ecause the Fifth Amendment proscribes taking without just compensation, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action." *Williamson,* 473 U.S. at 194, n.13. Therefore, even though DLX reserved its federal claims in the state action, it does not have a federal claim until just compensation has been denied. Until DLX has been denied just compensation through the procedures Kentucky has provided, its federal claims are not ripe. Therefore, this Court lacks subject matter jurisdiction, and DLX's complaint must be dismissed.

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[6] That doctrine, a combination of the abstention and res judicata doctrines, stands for the proposition that a federal district court may not hear an appeal of a case already litigated in state court. A party raising a federal question must appeal a state court decision through the state system and then directly to the Supreme Court of the United States.

In view of the decision that the Court lacks subject matter jurisdiction on ripeness and *Rooker/Feldman* theories, the Court need not reach Defendant's Eleventh Amendment argument.

Accordingly, based upon the analysis set forth above, **IT IS HEREBY ORDERED** as follows:

(1) Defendants' motion to dismiss (Doc. #5) be, and is, hereby **GRANTED**;

(2) Plaintiff's complaint be, and is, hereby **dismissed with prejudice**, and **stricken** from the docket of this Court.

This 24th day of March, 2003.

/s/

DAVID L. BUNNING
UNITED STATES DISTRICT JUDGE

APPENDIX D

SUPREME COURT OF KENTUCKY

1999-SC-0756-DG

[Rendered April 26, 2001]

COMMONWEALTH OF KENTUCKY, APPELLANT	)
v.	)
DLX, INC., APPELLEE	)

ON REVIEW FROM COURT OF APPEALS
1998-CA-0429-MR
FRANKLIN CIRCUIT COURT
NO. 97-CI-0049

JUDGES: Cooper, Graves, Keller, and Stumbo, JJ., concur. Wintersheimer, J., dissents by separate opinion, with Lambert, C.J.., joining that dissent.

OPINION OF THE COURT BY JUSTICE JOHNSTONE REVERSING

DLX, Inc., filed suit in the Franklin Circuit Court claiming that the Natural Resources and Environmental

Protection Cabinet ("Cabinet") had taken its property without compensation in violation of Section 242 of the Kentucky Constitution. The trial court granted the Cabinet's motion for judgment on the pleadings on grounds that the case was not ripe for judicial determination and that DLX failed to exhaust its administrative remedies. The Court of Appeals reversed on these issues. We granted the Cabinet's petition for discretionary review. We conclude that DLX failed to exhaust its administrative remedies and, therefore, reverse the Court of Appeals.

DLX owns the right to mine 2,845.4 underground acres of land, approximately 27.23 surface acres, in Letcher County, Kentucky. DLX has a permit with the Cabinet to mine and extract coal from this acreage. In 1994, DLX sought to amend the permit to mine an additional 168.52 acres of land adjacent to the land covered by the existing permit. This additional land lies under or immediately adjacent to the Lilley Cornett Woods, a national landmark. The Cabinet's Department for Surface Mining Reclamation and Enforcement ("DSM") denied the application. DLX appealed the denial to the full Cabinet and a seven day hearing was held on the matter.

The DSM denied the amendment out of its concern for the protection of the hydrologic system underneath the Lilley Cornett Woods. To protect the hydrologic system, the Cabinet's engineers suggested a vertical barrier within which it would not be permissible to mine. The engineers reasoned that a vertical barrier would protect the "stress relief-fracture system, "which is the primary source of groundwater movement in eastern Kentucky. In turn, this would ensure that groundwater would adequately flow through the Woods and no damaging erosion would result from the mining operation.

DLX submitted five proposals for the amendment to address the DSM's erosion concerns. The first three proposals were rejected by the Cabinet. The third proposal was rejected because the vertical limit of 110 feet proposed by DLX did not provide adequate protection for the Woods. DLX's fourth proposal contained a 250 feet barrier restriction. The Cabinet was prepared to agree to this barrier because it provided sufficient protection for the Woods. However, prior to the Cabinet's formal acceptance of the proposal, DLX withdrew it and submitted a fifth proposal. This proposal indicated that the Cabinet must accept the third proposal's 110 feet vertical limit or reject the amendment altogether. Citing protection of the Lilley Cornett Woods, the hearing officer recommended rejecting the amendment. The Secretary affirmed and adopted the recommendation. The matter became final on November 3, 1995.

DLX did not appeal the Secretary's final order. Instead, DLX filed suit against the Cabinet in the Franklin Circuit Court for taking its property without just compensation in violation of Section 242 of the Kentucky Constitution. The trial court found that DLX'S claim was not ripe for judicial determination and that DLX had failed to exhaust its available remedies. On these grounds, the trial court granted the Cabinet's motion for a judgment on the pleadings. Reversing, the Court of Appeals concluded that DLX'S claim was ripe for judicial determination and that it did not have to exhaust its administrative remedies before seeking judicial relief.

As a general rule, exhaustion of administrative remedies is a jurisdictional prerequisite to seeking judicial relief. *Goodwin v. City of Louisville*, 309 Ky. 11, 215 S.W.2d 557, 559 (1948). While there are exceptions to the general rule, none of them apply to the case at bar.

In its complaint, DLX alleged in part that: (1) the "Cabinet had no legal authority to treat mining under the Lilley Cornett Woods any differently than mining under forested watersheds;" (2) the Secretary's denial of the amendment was "arbitrary and capricious;" and (3) DLX produced substantial evidence that the proposed mining operation would not harm the surface of the property and that the Cabinet failed to produce evidence to the contrary. The trial court noted that these allegations were "more appropriately pled in an administrative appeal." Indeed, DLX had the right to appeal the Secretary's order. KRS 305.0305. The trial court specifically found that "it certainly is not clear that such an appeal would amount to an 'exercise in futility'. . . This finding is important because one of the exceptions to the exhaustion of remedies requirement is that a party is not required to exhaust its administrative remedies when to do so would be an exercise in futility. *See Harrison's Sanitarium v. Commonwealth, Department of Health, Ky.*, 417 S.W.2d 137, 139 (1967).

The Court of Appeals concluded that DLX did not have to exhaust its administrative remedies because its taking claim involved a constitutional issue, which the Cabinet successfully precluded from being raised at the administrative level. It reasoned that it would be futile for DLX to appeal an issue, i.e., unlawful taking under the Kentucky Constitution, that it was unable to raise at the administrative level. This reasoning fails to distinguish between facial and as-applied constitutional challenges.

Exhaustion of administrative remedies is not necessary when attacking the constitutionality of a statute or a regulation as void on its face. *Goodwin*, 215 S.W.2d at 559. This is because an administrative agency cannot decide constitutional issues. Id. Thus, to raise the facial constitutional validity of a

statute or regulation at the administrative level would be an exercise in futility. This exception does not apply in the case at bar, however, because DLX has not challenged the facial validity of the surface mining statutes and regulations. Rather, as its complaint shows, DLX's argument is that the Cabinet's application of the statutes and regulations resulted in an unconstitutional taking of its property.

When an administrative agency applies a statute unconstitutionally, it acts beyond the bounds of the constitution, rather than passing on a constitutional question. In other words, until a statute has been applied, there can be no unconstitutional application. This is the basis for the rule that one must first show injury as the result of a statutory application, before that application may be attacked as unconstitutional. *See, e.g., Stein v. Kentucky State Tax Commission*, 266 Ky. 469, 99 S.W.2d 443, 445 (1937). Thus, exhaustion of administrative remedies is not futile to an as-applied challenge to a statute. Quite the contrary, it is the administrative action which determines the extent, if any, of the constitutional injury.

The United States Supreme Court addressed this same issue in *Williamson Planning Commission v. Hamilton* Bank, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985). The Hamilton Bank Court explained the exhaustion of administrative remedies requirement in taking cases thusly:

> Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause. Although "the question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty," . . . the Court consistently

> has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. . . . Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

Id. at 191, 87 L. Ed. 2d at 141 (internal citations omitted).

The Court of Appeals erred in holding that making an unconstitutional-as-applied challenge in an administrative proceeding creates an exemption to the exhaustion-of-remedies requirement. Therefore, we reverse the Court of Appeals and hold that DLX's failure to exhaust its administrative remedies by failing to appeal the Secretary's order, deprived the Franklin Circuit Court of subject-matter jurisdiction to hear DLX's takings claim.

Cooper, Graves, Keller, and Stumbo, JJ., concur. Wintersheimer, J., dissents by separate opinion, with Lambert, C.J.., joining that dissent.

DISSENT

DISSENTING OPINION BY JUSTICE WINTERSHEIMER

I must respectfully dissent from the majority opinion because the claim of DLX was ripe for review as an exception to the exhaustion of administrative remedies doctrine. Here, DLX had no way of initiating or precipitating a challenge except by proceeding in circuit court. When DLX attempted

to raise its constitutional taking claims in the administrative proceedings, the motion of the Cabinet to strike the issue from the petition for review was granted. Consequently, DLX was prevented from raising the issue before the Cabinet. DLX did avail itself of the required administrative procedures by seeking the amended permit before the Cabinet and it is now seeking just compensation in court for the taking. *Cf. Harrison's Sanitarium, Inc. v. Commonwealth, Dept. of Health, Ky.*, 417 S.W.2d 137 (1967); *Greater Cincinnati Marine Service. Inc. v. City of Ludlow, Ky.*, 602 S.W.2d 427 (1980).

Although the Cabinet may have acted within its authority in denying the permit amendment, that does not prevent a finding that the action of the Cabinet did constitute a taking. *See Commonwealth of Kentucky ex rel Dept. for Natural Resources and Environmental Protection v. Stephens, Ky.*, 539 S.W.2d 303 (1976). The taking claim involved a constitutional issue and DLX was not permitted to raise the taking question in the administrative proceedings. Accordingly, it could not have raised the issue on appeal of that decision. The appeal of the decision of the Cabinet would have been an exercise in futility regarding the taking claim. *See Harrison's Sanitarium, supra.* Consequently, it was properly raised for the first time in the separate claim before the circuit court. The claim for inverse condemnation is ripe for determination.

I would affirm the decision of the Court of Appeals.

Lambert, C.J., joins this dissent.

Supreme Court, U.S.
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(3)

No. 04-1018

In the Supreme Court of the United States

DLX, INC.,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY, KENTUCKY ENVIRONMENTAL AND PUBLIC PROTECTION CABINET, AND THE SECRETARY, KENTUCKY ENVIRONMENTAL AND PUBLIC PROTECTION CABINET, IN HER OFFICIAL CAPACITY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT COMMONWEALTH OF KENTUCKY

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COUNTERSTATEMENT OF QUESTION PRESENTED

This case more particularly involves DLX's attempt to recover money damages, under the Fifth and Fourteenth Amendments, against a state defendant in federal court after DLX's aborted efforts to obtain a coal mine permit amendment which might have been issued. The question presented is as follows:

> Did the Sixth Circuit err when it determined that the Commonwealth of Kentucky was immune from suit in federal court for money damages on account of an alleged regulatory "taking" of coal?

SUPREME COURT RULES 29.6 AND 14.1(b) STATEMENT

The actual Respondent is the Commonwealth of Kentucky. The named Respondent, Environmental and Public Protection Cabinet, is an executive agency of the Commonwealth of Kentucky, formerly known as the Kentucky Natural Resources and Environmental Protection Cabinet. The named Respondent, Secretary of the Environmental and Public Protection Cabinet (LaJuana Wilcher being substituted for James E. Bickford) is an executive agency head sued in her official capacity. There is no dispute that each Respondent—Kentucky, the Cabinet and the Secretary sued in her official capacity—is "the State" for purposes of this action. (R.8, DLX Response to Motion to Dismiss, J.A., p. 299, footnote 1.) All nominal Respondents are represented herein by all counsel appearing on the cover of this Brief in Opposition.

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CITATION OF OPINIONS AND ORDERS

The Respondent agrees with Petitioner's description of decisions below, except to note two additional points: (1) the Kentucky Supreme Court upheld the dismissal of DLX's state takings claim on ripeness and exhaustion principles (Petition Appendix D, pp. 58a-64a); and (2) DLX's challenge to the agency's permit denial was the subject of an administrative Hearing Officer's Report and Cabinet Secretary's Order, which DLX chose not to appeal, choosing rather to file its regulatory takings claim in state court. The administrative findings are therefore conclusive, binding and beyond collateral attack. The administrative Hearing Officer's Report and Secretary's Order are found in the record of this case, at R.5, Joint Appendix (hereinafter "J.A.,") pp. 70-101.

COUNTERSTATEMENT OF BASIS FOR JURISDICTION

The Respondent agrees with Petitioner's Statement of Jurisdiction, subject only to the issues evident from the record of this case relating to Eleventh Amendment immunity and ripeness, which are both jurisdictional in nature.

INTRODUCTION

DLX alleges that the Commonwealth of Kentucky is liable in monetary damages for the alleged taking of coal by virtue of the Commonwealth's denial of an amendment to a permit under which DLX had already mined thousands of acres of coal. In a published Opinion, the Sixth Circuit held that the Eleventh Amendment prevents DLX from bringing a claim in federal district court for money damages against a state, even for an alleged "taking" brought pursuant to the Fifth and Fourteenth Amendments. (Pet. App. B, pp. 29a-33a.) No

Judge on the Sixth Circuit requested a vote on DLX's Petition for Rehearing en banc. (Pet. App. A, pp. 1a-2a.) This case was previously the subject of a reported opinion of the Kentucky Supreme Court which dismissed DLX's state takings claim based on ripeness and exhaustion principles. (Pet. App. D, pp. 58a-64a.)

This Court should not accept certiorari in this case because: (1) there is no split or conflict of authority among circuits on the question of the applicability of Eleventh Amendment immunity to takings cases, (2) the Sixth Circuit's Opinion regarding Eleventh Amendment immunity is correct and does not conflict with Supreme Court precedent and (3) there are several other issues necessitating this Court's affirmance on the record, or affirmance by a lower court in the event of remand.

COUNTERSTATEMENT OF THE CASE

Relevant Facts

This case involves DLX's application to amend an existing permit to mine coal under which DLX and its predecessor in interest had already been authorized to mine thousands of acres. The amendment application sought permission to mine 130 acres underneath the Lilley Cornett Woods in Letcher County, Kentucky. (Pet. App. D, p. 59a; R.5, Hearing Officer's Report, J.A., p. 72.) The Lilley Cornett Woods (hereinafter "Woods") is an old growth forest, biological research facility, wildlife refuge and designated National Natural Landmark. (R.5, Hearing Officer's Report, J.A., pp. 72 and 81-4.) Given the nature of this surface resource, the agency's review of the amendment application became concerned with the extent to which mining could be allowed

without interrupting the hydrologic balance in the Woods. (R.5, Hearing Officer's Report, J.A., pp. 76-81.)

The agency ultimately denied the amendment application because DLX withdrew its only viable hydrologic protection plan (which had proposed maintaining a vertical depth of cover, between mining and the Woods, of 250 feet) and substituted its previous submittal (proposing only 110 feet of vertical cover) without exploring any extent of mining between those depths of cover which might afford protection. (R.5, Hearing Officer's Report, J.A., pp. 73, 77-80 and 89.)

The scientific inquiry concerned what extent of mining could be allowed in the area of the Woods without causing mine-induced fracturing to connect with the naturally occurring stress relief fracture system—the primary source of groundwater movement in eastern Kentucky—and thus de-water the Woods. (R.5, Hearing Officer's Report, J.A., pp.76-81.) In regard to this inquiry, and consistent with Supreme Court Rule 15.2, the Respondent points out an egregious misstatement of fact at page 3 of the Petition, where Petitioner states that "DLX submitted a number of permit applications with greater and greater proposed vertical cover for its mining," and that the agency "insisted" on 250 feet of vertical cover. In fact, DLX filed a single application resulting in technical review and resubmittals concerning, among other things, hydrologic protection. In its second-to-last submittal on the hydrologic protection question, DLX proposed 250 feet of vertical cover, and the agency was at that point poised to issue the permit amendment. However, before the agency could issue the amendment, DLX withdrew the 250 foot submittal and substituted a 110 foot vertical cover which it had already been told was unsatisfactory, and requested the agency to issue or deny the application "as is." (R.5, Hearing Officer's Report, J.A., pp. 73, 89 and 102-3.) Therefore,

DLX did not file "a number of applications with greater and greater vertical cover," and the agency did not "insist" on a depth of cover of 250 feet. This misstatement of fact is relevant to the ripeness defect in this case, discussed *infra*.

The agency fact-finder found that the agency was willing to consider alternate proposals or additional scientific studies demonstrating that mining would not cause irreparable harm to the Woods (which might have allowed additional mining, or which might at least enable a takings jury to place a value on any alleged taking), but that DLX did not further engage the discussion. (R.5, Hearing Officer's Report, J.A., pp. 73 and 89.) Rather than seeking either approval of a revised plan, or judicial review of the agency's denial of the amendment application (which by statute it had the right to do, KRS 350.0305), DLX filed a takings action in state court alleging, *inter alia*, that the agency's findings were not supported by substantial evidence, that the agency misapplied its own regulations, and that the agency was arbitrary and capricious. (Compare DLX's state and federal complaints, R.1, J.A., pp. 5-9 and R. 5, J.A., pp. 59-69.)

The state court takings litigation concluded with a published opinion of the Kentucky Supreme Court which upheld the dismissal of DLX's state complaint on subject matter jurisdiction grounds. (Pet. App. D, pp. 58a-64a.) Although the Kentucky Supreme Court intertwined the issues of ripeness and exhaustion, it expressly relied on this Court's holding in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) to conclude its legal analysis as follows:

> Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just

> Compensation Clause. Although "the question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty," . . . the Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. . . Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

Commonwealth of Kentucky v. DLX, Inc., 42 S.W.3d 624, 626-7 (Ky. 2001), quoting *Williamson County*, at 473 U.S. 190-1 (internal citations omitted), Pet. App. D, pp. 62a-63a. While clearly based on ripeness principles, the Kentucky Supreme Court went on to hold that because DLX waived its statutory right of appeal from the Secretary's Order it could not proceed on its state constitutional takings claim.

Proceedings Below

DLX's federal complaint is nearly identical to the complaint which it filed in state court. (R.1, J.A., pp. 5-9; R.5, J.A., pp. 59-69.) It sought compensation against the Commonwealth of Kentucky for the same alleged taking, upon the same allegations that the agency findings were not supported by substantial evidence and were arbitrary and capricious, and even contained the same erroneous claims for "consequential damages" which DLX has since admitted have no basis in condemnation jurisprudence. (R.8, DLX Response to Motion to Dismiss, J.A., p. 299, footnote 2.) The Commonwealth moved to dismiss the complaint in the District

Court, pursuant to FRCP 12(b)(1), upon grounds of Eleventh Amendment immunity, *Williamson County* ripeness Prong I (failure to seek a final, definitive position on how the agency would apply the applicable regulations to its property), *Williamson County* ripeness Prong II (failure to meaningfully utilize its state court condemnation remedy), res judicata, the Rooker-Feldman doctrine[1] and exhaustion. The District Court agreed that it lacked subject matter jurisdiction on the basis of ripeness (using Prong II of *Williamson County*) and Rooker-Feldman. It did not rule upon any other basis for relief in the Motion to Dismiss. (Pet. App. C.)

On appeal to the Sixth Circuit, the Commonwealth preserved all of its defenses raised in the Motion to Dismiss. The Sixth Circuit held that the Eleventh Amendment operated to prevent DLX from bringing its claim for monetary damages against the Commonwealth of Kentucky in federal district court and rejected the Commonwealth's arguments based on *Williamson County* Prong II ripeness, Rooker-Feldman, res judicata and exhaustion. It declined to rule on *Williamson County* Prong I ripeness finding that, in the absence of fact-finding by the District Court, that inquiry was too fact-intensive. (Pet. App. B.)

In the concurring opinion, Judge Baldock, sitting by designation from the Tenth Circuit, agreed that the Sixth Circuit's Eleventh Amendment analysis was sound, but would have first disposed of the case jurisdictionally under the Rooker-Feldman doctrine and *Williamson County* ripeness Prong I, or as being barred by res judicata. (Pet. App. B, pp. 35a-37a and 39a-41a.) Not a single Judge on the Sixth Circuit

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[1] *Rooker v. Fidelity Trust Company*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

requested a vote on DLX's Petition for Rehearing en banc, and said petition was denied on October 28, 2004. (Pet. App. A.)

REASONS FOR DENYING THE WRIT

I. There Is No Split or Conflict of Authority Among Circuits on the Question of the Applicability of Eleventh Amendment Immunity to "Takings" Cases.

DLX's insistence that the Sixth Circuit's ruling is inconsistent with the "dominant thrust" (Petition, p. 7) of Fifth Amendment, Eleventh Amendment and Fourteenth Amendment jurisprudence is belied by the decisions of every federal Circuit Court of Appeals that has considered the issue. There is no split or conflict of authority among Circuits on the question of the Eleventh Amendment's applicability to Fifth Amendment takings cases. In fact, all five federal Courts of Appeal which have previously addressed this issue have reached the identical conclusion: *Citadel Corp. v. Puerto Rico Highway Authority*, 695 F.2d 31, 33 (1st Cir. 1982), *cert. denied*, 464 U.S. 815 (1983) ("even if the Constitution is read to require compensation in an inverse condemnation case, the Eleventh Amendment should prevent a federal court from awarding it"); *John G. and Marie Stella Kenedy Memorial Foundation v. Mauro*, 21 F.3d 667 (5th Cir. 1994), *cert. denied*, 513 U.S. 1016 (1994) (affirming the district court's dismissal of the plaintiff's Fifth Amendment claim on Eleventh Amendment grounds); *Garrett v. Illinois*, 612 F.2d 1038 (7th Cir. 1980) *cert. denied*, 449 U.S. 821 (1980) (holding Fifth Amendment claim barred by Eleventh Amendment despite assertion of self-executing nature of Fifth Amendment); *Broughton Lumber Company v. Columbia River Gorge Commission*, 975 F.2d 616 (9th Cir. 1992), *cert.*

denied, 510 U.S. 813 (1993) (holding that because state's immunity had not been abrogated or waived, damages claim brought pursuant to Fifth Amendment is barred by the Eleventh Amendment); and *Robinson v. Georgia Department of Transportation*, 966 F.2d 637 (11th Cir. 1992), *cert. denied*, 506 U.S. 1022 (1992) (affirming dismissal of Fifth Amendment takings suit on Eleventh Amendment grounds).

The Circuits are uniform in their application of Eleventh Amendment immunity to Takings Clause damage suits brought against states in federal court. The Circuit Courts' consistent application of the constitutional precedents of this Court reveals the strained nature of DLX's attempt to invent a conflict between this Court's previous decisions and the Sixth Circuit's decision. Since there is no confusion or split of authority among the Circuits, and the Sixth Circuit could find no contrary authority for applying immunity to such suits, there is no reason for this Court to grant certiorari in this case.

The only conflict alleged in the Petition is with another Sixth Circuit decision. However, DLX is wrong when it suggests that the Sixth Circuit's opinion is "squarely in conflict" with *Arnett v. Myers*, 281 F.3d 552 (6th Cir. 2002). (Petition, p. 9.) The Sixth Circuit's decision in *Arnett* in no way stands for the proposition that takings claims seeking compensation are not barred by the Eleventh Amendment. Despite DLX's gross misreading of *Arnett*, it is clear that the plaintiffs there did not assert a claim for money damages. In fact, the Sixth Circuit itself characterized DLX's argument on this point as "lack[ing] merit." (Pet. App. B, pp. 30a-31a, footnote 14.)

The plaintiffs in *Arnett*—owners of fishing rights and duck blinds on Reelfoot Lake—sued Tennessee officials for

declaratory and injunctive relief, not for damages, after the officials physically removed their duck blinds from the lake. *Id.* at 558-9. Unlike the present case, *Arnett* was not a takings case filed for damages, but applied the *Ex parte Young*, 209 U.S. 123 (1908), exception for a takings claim seeking equitable relief. DLX's truncated quotes of the Court's opinion, at pages 9-10 of the Petition, do not convey the true analysis of the holding, which is evident in the Sixth Circuit's succeeding discussion:

> Eleventh Amendment sovereign immunity does not bar the Arnetts' claims in this case. **The Arnetts seek prospective equitable relief to enjoin Tennessee officials** from committing continuing violations of federal law, namely violation of their rights under the Fifth and Fourteenth Amendments. **The *Ex parte Young* exception applies in this case**, and *Couer d' Alene* does not dictate a contrary result.

Arnett, 281 F.3d at 568 (emphasis added). *Arnett*, a decision on a claim for declaratory and prospective injunctive relief, is entirely consistent with the principle that the Eleventh Amendment bars original actions for money damages against a state in federal district court. See *Ex parte Young*, *supra*. Therefore, it should be clear that the Sixth Circuit did not depart from its own precedent in this case. Since the Sixth Circuit in the present case followed both its own established precedent and that of a unanimous set of Circuits, DLX has not presented a substantial question worthy of certiorari.[2]

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[2] Even if the Sixth Circuit's decision in *DLX* were in conflict with the decision of another panel of that Court in *Arnett*, which it is not, such a conflict could be resolved through an en banc review within that Circuit. Such intra-circuit conflicts are ordinarily resolved in

II. The Sixth Circuit's Opinion Regarding Eleventh Amendment Immunity Does Not Conflict With Supreme Court Precedent and Thus the Question Presented Is Not of Such Importance As to Warrant This Court's Attention.

This Court has not heretofore recognized an exception to Eleventh Amendment jurisprudence for Fifth Amendment takings claims, and there is no need to do so now, especially upon the facts presented in this case. Since at least 1890, with the decision in *Hans v. Louisiana*, 134 U.S. 1 (1890), the susceptibility of states to suit in federal court for monetary damages has been well settled. Likewise, the limited exceptions to Eleventh Amendment immunity are also well settled and include only those instances where the state waives its immunity and consents to suit in federal court, where Congress clearly abrogates immunity pursuant to Section 5 of the Fourteenth Amendment, or where the plaintiff sues a state official for prospective injunctive relief to end a continuing violation of federal law or a constitutional deprivation. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), *Alden v. Maine*, 527 U.S. 706 (1999) and *Tennessee v. Lane*, 541 U.S. 509 (2004). As noted in Section I, *supra*, all of the Circuits which have addressed this issue in the context of Fifth Amendment damage suits against States are consistent with this Court's decisions.

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the circuit affected, rather than by this Court upon a petition for writ of certiorari. See *Davis v. United States*, 417 U.S. 333, 340 (1974) and R. Stern & E. Gressman, Supreme Court Practice, 235-6 (8th Ed. 2002). However, as pointed out in this Brief in Opposition, the decision in *DLX* is not even remotely in conflict with *Arnett*.

Moreover, in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), this court implicitly concluded that Eleventh Amendment immunity bars federal court takings claims seeking damages against States. At issue in *Lake Country Estates* was a takings claim for damages against a bi-state agency created by a congressionally approved interstate compact between California and Nevada. This court rejected the agency's assertion of Eleventh Amendment immunity as being:

> . . . an expansive reading of the Eleventh Amendment. By its terms, the protection afforded by that Amendment is only available to 'one of the United States.' It is true, of course, that some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself.

Id. at 400-1. By necessary implication, the Eleventh Amendment would have protected the planning agency's parent states from liability on Lake Country Estates' claims, had they been parties to the suit. This court went on to note that "[b]ecause of our disposition of this question, we need not address petitioner's argument that, even assuming TRPA might be entitled to Eleventh Amendment immunity, such protection was affirmatively waived by the compacting States." (Citation omitted.) *Id.* at 402, footnote 23. Implicit in this discussion is the Court's assumption that the Eleventh Amendment applies to takings claims.

The Sixth Circuit's decision below is also consistent with this Court's long-standing recognition of the parallel immunity of the federal government (absent a waiver) from takings

claims. *See Schillinger v. United States*, 155 U.S. 163, 166-9 (1894) (applying immunity to a claim for the alleged improper use or taking of a patent); *Lynch v. United States*, 292 U.S. 571 (1934) (where, in dicta, after the Court recognized that "the Fifth Amendment commands that property be not taken without making just compensation," *Id.* at 579, the Court stated that "[t]he rule that the United States may not be sued without its consent is all-embracing," *Id.* at 581); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697, footnote 17 (1949), *reh. denied*, 338 U.S. 840 (an injunctive action to compel the delivery of surplus coal under a contract with the War Assets Administration, where the Court stated that at the time of one of its previous decisions in 1882 "[t]here clearly was no remedy available by which [a landowner] could have obtained compensation [from the federal government] for the taking of his land"); and *Webster v. Doe*, 486 U.S. 592, 613 (1988) (Scalia dissenting) ("[n]o one would suggest that, if Congress had not passed the Tucker Act, 28 U.S.C. §1491(a)(1), the courts would be able to order disbursements from the Treasury to pay for property taken under lawful authority (and subsequently destroyed) without just compensation," citing *Schillinger*, *supra*).

DLX does not cite any decision which conflicts with any of the cases cited above. It does cite a number of cases, at pages 11-14 of the Petition, which it uses to argue the "self-executing" nature of the Takings Clause. However, it concludes that discussion by explaining that "[t]he analysis of whether the clause is or is not self-executing is not dependent on or even necessarily related to an analysis of the reach of the Eleventh Amendment." (Petition, p. 14.) Therefore, DLX concedes that the arguably self-executing nature of the Fifth Amendment is not germane to the reach of the Eleventh Amendment. DLX cannot cite any decision which recognizes a Takings Clause exception to a State's sovereign immunity

under the Eleventh Amendment, and there is no pressing need to find one now.[3]

DLX's continued reliance on dicta from this Court's plurality opinion in *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304 (1987) to argue that the Fifth Amendment's "self-executing character" elevates it above the other Amendments (most notably, the Eleventh), is misplaced. Even if DLX is correct that the Fifth Amendment is self-executing, the Court should not grant the Petition. The Sixth Circuit's holding that takings damages are not recoverable against a state in federal court is simply not inconsistent with such an analysis. Compare *Reich v. Collins*, 513 U.S. 106 (1994) (due process clause required state to

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[3] That the Sixth Circuit's decision below does not warrant further review by this Court seems to find support in an amicus brief recently filed by one of the nation's leading property rights advocates. Michael Berger, in his Brief of Amicus Curiae Franklin P. Kottschade, *San Remo Hotel L.P. v. City and County of San Francisco, et al.*, No. 04-340 (2005), at 5, states that: "But the *state* is not involved in 42 U.S.C. §1983 cases like this one. States and their officials cannot be sued under Section 1983 (*Will v. Michigan Dept. of Police*, 491 U.S. 58 [1989]), nor (with very narrow exceptions [*Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003)]) can they be brought into federal court at all against their will (U.S. Const., 11th Amendment). The real issue in cases like this is whether the local entity—like the City and County of San Francisco at bench—is alleged to have taken private property for public use and failed to pay for it. If so, the question whether the city can be *compelled* to pay lies at the heart of litigation in either state or federal court." (Italics in original.) It would seem, therefore, that not only is this Court's Eleventh Amendment jurisprudence well settled, but so too are the expectations of the property rights bar.

provide state court remedy for deprivation of taxes in violation of federal law).

Also, while *First English* held that the Fifth Amendment does provide a remedy for a taking, the Eleventh Amendment was not even an issue in the case. This is because the defendant there was a municipality, rather than a state. The Eleventh Amendment has no applicability to damage suits brought in federal court against municipalities. *Alden*, at 527 U.S. 756. Similarly, DLX's citation to *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), is inapposite. There is no indication that the Eleventh Amendment was raised as a defense in *Palazzolo*. The Eleventh Amendment is an affirmative defense and is not necessarily jurisdictional. Therefore, a court can raise it or it can ignore it if it is waived. *See Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381 (1998), and *Kovacevich v. Kent State University*, 224 F.3d 806 (6th Cir. 2000). Contrary to DLX's assertion at page 14 of the Petition, a court's review of a Fifth Amendment takings case without discussing the Eleventh Amendment (as this Court did in *Palazzolo*) does not equate to a holding that Fifth Amendment claims override Eleventh Amendment immunity. *See McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 27-31 (1990) (Eleventh Amendment does not preclude the Supreme Court's exercise of appellate jurisdiction over the decisions of a state's highest court.)

As is the case for any takings plaintiff who has an adequate state court condemnation remedy, DLX cannot truly claim constitutional harm. This is because DLX was not deprived of a remedy, and this is arguably all that the Fifth Amendment guarantees. *See Boise Cascade Corporation v. State of Oregon*, 991 P.2d 563, 567 (Or. 1999), *review denied*, 18 P.3d 1099 (2000), *cert. denied*, 532 U.S. 923

(2001). Because the Kentucky courts have, since at least 1984 with the decision of *Commonwealth of Kentucky, Natural Resources and Environmental Protection Cabinet v. Stearns Coal & Lumber Company*, 678 S.W.2d 378 (Ky. 1984), *appeal dismissed at* 473 U.S. 921 (1985), *reh. denied*, 473 U.S. 926, expressly recognized a remedy in inverse condemnation, this is not a case where a takings plaintiff is without a reasonable and adequate state condemnation remedy. This Court has stated: " 'the issue [in applying the Eleventh Amendment] is not the general immunity of the States from private suit . . . but merely the susceptibility of the States to suit before federal tribunals.' " *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 240, footnote 2, internal citation omitted (1985), *reh. denied*, 473 U.S. 926. Therefore, DLX has not presented a question of sufficient importance to require the granting of certiorari.

While DLX promises in its argument heading an "important question" among its reasons for granting certiorari (Petition, page 7), the text of the Petition fails to state one. All this case is about is whether the Eleventh Amendment bars a remedy in federal court against a non-consenting state for retroactive money damages. Upon this question, this Court's jurisprudence is clear and well settled. The Petition presents no constitutional crisis, particularly because what is submitted for this Court's review is a fact-bound case characterized by procedural waivers, of DLX's own making, giving rise to other jurisdictional and preclusive defects. (See Argument III, *infra*.) Indeed, the substantive portions of DLX's federal complaint (R.1, J.A., pp. 5-9) read like a collateral attack of the unappealed agency findings. This Court need not accept an invitation to create a new exception to Eleventh Amendment immunity upon a case such as this one.

Finally, this Court has observed that land use regulation is something which is traditionally handled at the local government level. *Lake Country Estates, supra*, 402 (1979). Given that this particular case is factually and procedurally flawed, and that most land use disputes arise against local government entities, the impact of the Sixth Circuit's decision below (consistent with decisions of the First, Fifth, Seventh, Ninth and Eleventh Circuits, and with no Circuit to the contrary) to apply the Eleventh Amendment to a federal action against a State for takings damages, is not of sufficient scope to warrant certiorari.

III. There are Several Other Issues Necessitating this Court's Affirmance on the Record, or Affirmance By a Lower Court in the Event of Remand.

Another reason why this Court should deny certiorari is that there are several other jurisdictional or procedural issues on which the Commonwealth of Kentucky will prevail. Therefore, even if the Eleventh Amendment is found not to bar this action, this Court's review is not likely to affect the ultimate outcome of this case.[4]

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[4] The Respondent hereby gives notice in its Brief in Opposition that it will rely upon all issues supported by the record in defending the result below, should this Court grant certiorari. These alternative grounds include *Williamson County* ripeness Prongs I and II, res judicata and application of the Rooker-Feldman doctrine. While this brief is not the appropriate place to extensively argue alternative grounds for affirmance on the merits, the Respondent intends to preserve all issues supported by the record for consideration in its brief on the merits, should this Court grant certiorari. None of the alternative grounds for relief would request this Court to expand in any way the scope of the judgment already

1. Ripeness Prong I—Under this analysis, this Court has required that for a takings claim to be ripe for purposes of a federal court's Article III jurisdiction, an applicant for a benefit or privilege before an administrative agency must first have allowed the agency to arrive at a "final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Williamson County*, at 473 U.S. 190-1. A takings claim is not ripe where the agency has left open the possibility that some development will be permitted, because "rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." *MacDonald, Sommer & Frates v. County of Yolo, et al.*, 477 U.S. 340, 353, footnote 9 (1986), *reh. denied*, 478 U.S. 1035.

The Commonwealth's argument on this question is based on DLX's withdrawal of its only viable hydrologic protection plan, replacing it with a plan that it had already been told was unsatisfactory, and demanding issuance or denial of the application "as is." (R.5, Hearing Officer's Report, J.A., pp. 73, 77-80, 89 and 102-3.) The Sixth Circuit chose not to resolve this issue as being too fact-dependent, but discussed it as follows:

> It seems at first blush that Kentucky has the better of this argument—DLX's futility argument is based on a mischaracterization of Peterson's testimony, and

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obtained in the Commonwealth's favor. *See Northwest Airlines, Inc. v. County of Kent, Michigan*, 510 U.S. 355 (1994) and Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction 2d §4004.4.

> examining that testimony reveals that he would have been receptive to a permit application stipulating less vertical cover accompanied by additional data. . . .

(Pet. App. B, pp. 27a-28a.) The concurring opinion would have dismissed DLX's claim on ripeness grounds, using res judicata and the Rooker-Feldman doctrine. (Pet. App. B, pp. 35a-37a and 39a-41a.) The Commonwealth will maintain that the Sixth Circuit avoided a threshold jurisdictional issue despite an ample record, and without recognizing the preclusive effect of binding, unappealed agency findings establishing the lack of a final agency action under *Williamson County* Prong I. (R.5, Hearing Officer's Report, J.A., pp.73, 77-80, 89 and 102-3.)

2. Ripeness Prong II—Under this analysis, this Court has required that for a federal takings claim to be ripe the claimant must first have used the state court condemnation remedy (if there is one) and been denied compensation. *Williamson County*, at 473 U.S. 194-5. In the present case, the Kentucky Supreme Court has already held that DLX could not invoke the state condemnation court's subject matter jurisdiction due to its prior procedural waivers, and thus left itself in the position of being unable to show that it had in fact been *denied* just compensation. Therefore, as a matter of state law, DLX forfeited its claim. *See also Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87 (1st Cir. 2003), *cert. denied*, 540 U.S. 1090 (2003). This was, in relevant part, the holding of the federal District Court. (Pet. App. C, p. 56a.) The Sixth Circuit rejected this holding upon its erroneous assumption that the Commonwealth of Kentucky was equating the ripeness Prong II requirement with state exhaustion principles. (Pet. App. B, p. 14a.) Thus, if the Eleventh Amendment did not bar DLX's suit in federal district court, *Williamson County* ripeness would. The Commonwealth will

maintain that the federal courts lack subject matter jurisdiction due to DLX's ripeness defects.

3. Res judicata—DLX's federal complaint is nearly identical to the one it filed in state court. (R.1, J.A., pp. 5-9; R. 5, J.A., pp. 59-69.) It arises out of the same permit denial which was the subject of the state takings action. The state's highest court held that it was barred by state and federal law from deciding DLX's takings claims on subject matter jurisdiction grounds. (Pet. App. D.) Despite DLX's attempt to reserve its federal claim, federal authority holds that Kentucky's state court adjudication of DLX's claim is entitled to full faith and credit, and is also entitled to preclusive effect under state and federal law. *See* 28 U.S.C. §1738 and *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984). The concurring opinion below would have dismissed DLX's takings claim upon the view that the *England*-reservation doctrine is applicable only to reserve federal questions in state court after federal court abstention. (Pet. App. B, p. 40a.) The Commonwealth will maintain that DLX's federal claim is precluded by virtue of the state court adjudication of the same allegations.[5]

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[5] The Respondent is aware that the issue of the preclusive effect of a state court takings adjudication, in the face of an attempted reservation of the federal claim, is currently pending this Court's review in *San Remo Hotel, L.P. v. City & County of San Francisco, et al.*, 364 F.3d 1088 (9th Cir. 2004), *cert. granted*, 125 S.Ct. 685 (U.S. Dec. 10, 2004) (No. 04-340). Even if the Court is tentatively inclined to grant certiorari in the present case on the Eleventh Amendment issue, the Respondent respectfully requests that it hold this case until its resolution in *San Remo*, and then deny certiorari in the present case if the decision in *San Remo* supports the Commonwealth's argument herein.

4. Rooker-Feldman—The District Court also held that it lacked jurisdiction under the Rooker-Feldman doctrine, concluding that "the federal claims asserted by DLX are identical to the claims adjudicated in state court," and recognizing that to assert its jurisdiction over the federal claims would put it in the position of reviewing the state court decision in violation of 28 U.S.C. §1257(a). (Pet. App. C, pp. 55a-56a.) *See also Anderson v. Charter Township of Ypsilanti*, 266 F.3d 487 (6th Cir. 2001). While the Sixth Circuit declined to so hold because of its assumption that the state court adjudication was limited to the state doctrine of exhaustion of administrative remedies, the concurring opinion concluded, and the Commonwealth will maintain, that the state court decision was firmly founded upon the ripeness principles laid out in *Williamson County*, and that the federal District Court did not have jurisdiction over DLX's federal claims.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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In the

Supreme Court of the United States

DLX, INC.,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY; KENTUCKY ENVIRONMENTAL AND PUBLIC PROTECTION CABINET; and THE SECRETARY, KENTUCKY ENVIRONMENTAL AND PUBLIC PROTECTION CABINET, in her official capacity,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTION PRESENTED

Does the Eleventh Amendment bar suits under the Fifth Amendment seeking to force states to pay just compensation for unconstitutional takings of private property?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit, public interest law foundation of its kind in America. Litigating nationwide since 1973, PLF provides a voice in the courts for thousands of Americans who believe in the principles of limited government, free enterprise, and individual freedom. For more than 30 years, PLF has been litigating in support of the rights of individuals to make reasonable use of their private property. PLF attorneys have been before this Court on three occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). All parties have consented to the filing of this brief.[1]

PLF has a long history of participation in important litigation as amicus curiae, filing briefs in nearly every major real property takings case heard by this Court in the last three decades, including several cases that are now before this Court. *See San Remo Hotel, L.P. v. City and County of San Francisco, California*, Docket No. 04-340; *Lingle v. Chevron U.S.A. Inc.*, Docket No. 04-163; and *Kelo v. City of New London, Connecticut*, Docket No. 04-108. PLF has consistently maintained the position that property owners have a federal constitutional right to cash compensation for a taking. PLF's

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

Fifth Amendment expertise and litigation experience will provide an additional, valuable viewpoint on the issues presented in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case represents the impact point of two doctrines that have been on a collision course for three decades: Eleventh Amendment Immunity and Regulatory Takings. For while states are sovereigns who "entered the federal system with their sovereignty intact," *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991), it is "axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). The question presented by this case is what happens when a state takes property and these two principles collide: Do private property rights yield to the Eleventh Amendment or do principles of immunity yield to the Takings Clause?

Where the Eleventh Amendment applies, states enjoy immunity from all private suits for damages unless it has been abrogated or the state has waived its immunity. This principle of sovereign immunity is so important that the "Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 n.2 (1985). Most recently, *Alden v. Maine* clarified that principles of sovereign immunity shield states from private suits for damages in state courts as well as federal courts. 527 U.S. 706 (1999). After *Alden* then, waiver or abrogation of sovereign immunity is

required for all suits in state or federal court unless those suits seek only prospective injunctive relief. *Id.* at 747 (explaining the *Ex parte Young* exception exists to ensure that the "Constitution is to remain the supreme law of the land," despite immunity).

But the Eleventh Amendment does not apply to the Fifth Amendment, and it is unnecessary to examine whether immunity has been waived or abrogated. The Takings Clause demands compensation whenever government takes private property—the compensation requirement is a substantive limit on the state's ability to take property without the owner's consent. The Takings Clause thus provides a unique exception to the states' usual immunity from suit. And while most takings claimants sue local government entities that may not invoke Eleventh Amendment immunity, a growing number of litigants must sue the state itself. These claimants, entitled to compensation by the constitutional text, find themselves precluded from filing suits for compensation in jurisdictions that apply the Eleventh Amendment.

If the Eleventh Amendment does apply to the Takings Clause, it is necessary to examine whether the immunity has been waived by the state or abrogated. The Takings Clause is applicable to the states through the Fourteenth Amendment, which permits the federal government to abrogate state immunity. *See, e.g., Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001). And while most abrogation requires a statute, the Takings Clause is self-executing; claims "based on the right to recover just compensation for property taken" do not require "[s]tatutory recognition" but are "founded upon the Constitution of the United States." *Jacobs v. United States*, 290 U.S. 13, 16 (1933). The self-executing nature of the Fifth Amendment thus automatically abrogated state sovereign immunity when it was incorporated through the Fourteenth Amendment.

This analysis, although consistent with this Court's precedents, has been rejected by the lower federal courts. *See DLX, Inc. v. Kentucky*, 381 F.3d 511, 528 (6th Cir. 2004) (citing cases from the First, Fifth, Seventh, Ninth, and Eleventh Circuits agreeing that the Eleventh Amendment bars takings claims in federal court). The result is that property owners cannot invoke the substantive protections of the Fifth Amendment and the state may freely ignore the constitutional condition placed on the use of the eminent domain power.

Without an avenue of redress for takings claims, "all property rights . . . exist only at the whim of the sovereign," a situation clearly at odds with the principles animating the Constitution. *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 697 (1982). Because of the importance of this question and the widespread misunderstanding among the courts of appeals, this Court should grant the petition for certiorari and announce that the self-executing character of the Takings Clause compels a unique exception to the general immunity from suit provided by the Eleventh Amendment.

ARGUMENT

I

THIS CASE PRESENTS THE IMPORTANT QUESTION OF WHETHER THE ELEVENTH AMENDMENT'S IMMUNITY FROM SUIT BARS A LITIGANT FROM BRINGING A REGULATORY TAKINGS CLAIM AGAINST THE STATE

A. The Eleventh Amendment Does Not Apply to Takings Claims Because the Compensation Required by the Fifth Amendment Is Not a Remedy but a Constitutional Imperative

The Eleventh Amendment does not apply to the Takings Clause, incorporated against the states through the Fourteenth

Amendment. It is instead a concrete limit on government power to compel the transfer of property. Though commonly discussed in terms of a remedy, the Takings Clause's requirement that private property not be taken without just compensation is just that: a constitutional requirement. It is therefore unnecessary to examine whether immunity has been abrogated or whether the state has consented to suit: the analysis simply is not required.

The phrase "without just compensation" is not the remedial arm of the Takings Clause but a distinct limit on government power. *See* Paul J. Heald & Michael L. Wells, *Remedies for the Misappropriation of Intellectual Property by State and Municipal Governments Before and After Seminole Tribe: The Eleventh Amendment and Other Immunity Doctrines*, 55 Wash. & Lee L. Rev. 849, 870-71 (1998) (explaining that the "central aim" of the Takings Clause "is to limit the 'government's power to isolate particular individuals for sacrifice to the general good' " (quoting Laurence H. Tribe, *American Constitutional Law* § 9-6, at 605 (2d ed. 1988))). The Takings Clause is not "an invitation to sue for payment," but an affirmative limit on state and local power, requiring that they either pay for property or leave it alone. *See* Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 Urb. Law. 671, 695 (2004). Viewed properly, then, Petitioner DLX does not ask the federal courts to give it a damages remedy for a constitutional violation but simply asks the courts to enforce the Constitution's plain text. Because this text was incorporated directly against the states through the adoption of the Fourteenth Amendment, the Eleventh Amendment has nothing to do with the compensation requirement of the Takings Clause.

Further, "[i]t is a proposition too plain to be contested that the Just Compensation Clause of the Fifth Amendment is

'repugnant' to sovereign immunity and therefore abrogates the doctrine." Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. U. L. Rev. 144, 199 (1996). The very origins of the notion of immunity—that the government both defines the rights of citizens and determines whether and to what extent citizens may enforce those rights against their sovereign government—is contrary to the idea of self-government, particularly so when "We the People" have expressly declared that government shall not take private property "for public use without just compensation." U.S. Const. amend. V. Put simply, "a taking without payment of just compensation is a constitutional oxymoron." Grant, *A Revolutionary View*, 91 Nw. U. L. Rev. at 200.

But the Sixth Circuit misapprehended the special characteristics of the Takings Clause. The court below recognized that "*First English* makes clear that the Fifth Amendment Takings Clause is a self-executing remedy, notwithstanding sovereign immunity," but found that the Eleventh Amendment bars DLX's claims. *DLX, Inc. v. Kentucky*, 381 F.3d at 527. This analysis assumes that Eleventh Amendment immunity is absolute, but this Court has long recognized that "certain suits for declaratory or injunctive relief" must be permitted, despite the Eleventh Amendment, "if the Constitution is to remain the supreme law of the land." *Alden*, 527 U.S. at 747 (citing *Ex parte Young*, 209 U.S. 123 (1908)). At its core, this limited exception to the Eleventh Amendment for injunctive relief embraces the practical reality that there must be a federal forum available to enforce the plain text of the Constitution lest its protections become meaningless. The Petitioner asks for nothing more here, requesting only that the federal courts enforce the plain text of the Constitution and determine whether the state must comply with the Fifth Amendment's just compensation requirement for taking their private property. After successfully running the *Williamson*

County gauntlet by seeking a state-based remedy for the taking of their property and being denied, Petitioner must be allowed to vindicate a violation of the Constitution's plain text in federal court.

The Sixth Circuit instead adopted a scheme in which a property owner must litigate his federal takings claim in state court and *state court alone*. Though the court below was undoubtedly correct that the Takings Clause abrogates sovereign immunity in state courts, there is no reason for so limiting the abrogation. According to the court below, the self-executing nature of the Takings Clause is strong enough to abrogate sovereign immunity in state court but not in federal court. But where it applies, "sovereign immunity bars relief against States and their officers in both state and federal courts." *Alden*, 527 U.S. at 747. Indeed, the principle that immunity extends to state courts is so central that it was the motivation for this Court's creation of the *Ex parte Young* exceptions. *See Alden*, 527 U.S. at 747-48. In short, there is no principled reason to abrogate state immunity in state court but not federal court.

The Takings Clause applies to the states, and the Takings Clause expressly requires just compensation when government takes private property. Petitioners thus seek a ruling requiring the federal courts to apply the Clause's plain text. In this way, they are similar to a litigant asking the federal courts for relief under *Ex parte Young*: both come to the Court seeking judicially compelled enforcement of constitutional text. The logic and reasoning behind the Eleventh Amendment is inapplicable to the Takings Clause—compensation is a condition of the government's eminent domain power and any taking without such payment is illegitimate. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 717 (1999) ("Although the government acts lawfully when, pursuant to proper authorization, it takes property and provides just compensation, the government's action is lawful solely

because it assumes a duty, imposed by the Constitution, to provide just compensation."). This Court has never made this important but implicit principle explicit, which has resulted in a confused collage of law on the subject in the lower federal courts. The petition should be granted to resolve this important question of law.

B. If the Eleventh Amendment Applies to Takings Claims, Immunity Is Abrogated by the "Self-Executing" Nature of the Takings Clause

If the Eleventh Amendment does apply to Takings claims, the incorporation of the Fifth Amendment through the adoption of the Fourteenth Amendment abrogated sovereign immunity. Even when viewed as a remedy or "damages," then, a lawsuit seeking compensation required by the Takings Clause is nevertheless unencumbered by the Eleventh Amendment. Though states normally enjoy immunity from damages for suit, the Takings Clause does not provide an ordinary cause of action. It is self-executing insofar as it requires no implementing legislation: suits for compensation are founded directly upon the Constitution itself. This self-executing character, as part and parcel of the Takings Clause, was incorporated against the states through the adoption of the Fourteenth Amendment.

1. The Fourteenth Amendment Worked an Important Change in the Application and Enforcement of Constitutional Rights

States generally enjoy immunity from suits for damages in federal court, but this immunity is not absolute. *See Alden v. Maine*, 527 U.S. at 713. The Constitution, as it existed before the adoption of the Fourteenth Amendment, left states with the exclusive power to allow suits seeking damages for a violation of a federal right, regardless of whether that right arose from a federal statute or constitutional provision. *See id.* at 755

(explaining that, before the adoption of the Fourteenth Amendment, the consent of the States was the only exception to the states' immunity from private suits designed to enforce the Constitution); *see also Hans v. Louisiana*, 134 U.S. 1, 14-15 (1890) (upholding a state's immunity from a suit arising under the Constitution). But the adoption of the Fourteenth Amendment transformed the preexisting federal-state balance. Among other things, it imposed a new requirement upon states to refrain from "depriv[ing] any person of life, liberty, or property, without due process of law." *See* U.S. Const. amend. XIV, § 1.

This due process provision incorporated many if not all of the individual rights protected by the federal Constitution and thus bound states by those rights. Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religions Exemptions Under the Fourteenth Amendment*, 88 Nw. U. L. Rev. 1106, 1147 n.188 (1994) (discussing the selective incorporation doctrine). That is, "the prohibitions of the [Fourteenth] amendment refer to all the instrumentalities of the state,—to its legislative, executive, and judicial authorities." *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 233 (1897). The Fourteenth Amendment's Due Process requirement "recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public." *Id.* at 236.

To date, most of the rights guaranteed by the Bill of Rights have been incorporated against the states through the Fourteenth Amendment. *See* Daniel E. Troy, *Advertising: Not "Low Value" Speech*, 16 Yale J. on Reg. 85, 109 (1999). As a result, individuals may sue state officers to halt the ongoing violation of a federal constitutional right, the state's immunity from suit notwithstanding. *See Ex parte Young*, 209 U.S. at 159-60 (sovereign immunity does not preclude a suit against state officers in federal court designed to secure prospective equitable relief from constitutional violation). Incorporating the

Takings Clause through the Fourteenth Amendment, worked an important change: It applied the Fifth Amendment's compensation limit to the states eminent domain power and made it a federally protected right.

2. The Takings Clause Abrogates State Immunity Through Incorporation in the Fourteenth Amendment

Even if the Fifth Amendment's just compensation requirement is viewed as a remedy, the Eleventh Amendment still does not bar this suit because the Takings Clause abrogates state immunity through its incorporation under the Fourteenth Amendment. Unlike the Fifth Amendment, other constitutional rights do not provide their own remedy. In fact, the Constitution "refers explicitly to remedies in only two instances": habeas corpus and the Takings Clause. *See The Federal Courts and the Federal System* (Fallon, Meltzer & Shapiro, eds. 2003) (pointing out that the "remedy of habeas corpus is safeguarded" and that the "Just Compensation Clause 'dictates the remedy for interference with property amounting to a taking'—compensation for the impairment of value"). With these two exceptions, the incorporation of all other federal constitutional rights against the states via the Fourteenth Amendment do not by themselves impose a remedy against the states and so waive the states' immunity.

But the Takings Clause is "self-executing." *First English*, 482 U.S. at 315. Because the Clause declares its own redress, a taking of private property for public use must always be remedied by the payment of compensation for the property right taken. *See id.* ("[G]overnment action that works a taking of property rights necessarily implicates the '*constitutional obligation* to pay just compensation.' " (emphasis added) (quoting *Armstrong*, 364 U.S. at 49)). Given its unique characteristics, no congressional abrogation of immunity or state consent to compensation is necessary to enforce the

Takings Clause. The compensation cure is self-evident and self-executing and thus, incorporated through the Fourteenth Amendment, requires the states to pay money whenever they take private property. *First English*, 482 U.S. at 319 ("Where [a] burden [on a property owner] results from governmental action that amounted to a taking, the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period.").

Because of its self-executing nature, the Takings Clause is an exception to the general framework requiring additional legislative action before state immunity is abrogated. *See id.* at 315 (explaining that "claims for just compensation are grounded in the Constitution itself"). As explained above, governments lack the power to take property unless they provide just compensation. Thus, immediately upon incorporation, the Clause itself abrogated the states' immunity from suit because the Clause brings with it a compensation remedy. Four members of this Court have recognized as much, openly questioning whether immunity "retains its vitality" in the context of the Fifth Amendment, citing to *First English*. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. at 714 (Kennedy, J., joined by the Chief Justice and Justices Stevens and Thomas) ("Even if the sovereign immunity rationale retains its vitality in cases where [the Fifth] Amendment is applicable, *cf. First English* . . . .").

A necessary corollary to the fact that the federal just compensation requirement is self-executing and fully incorporated is that states must answer suits alleging that they owe compensation for a completed taking. *See First English*, 482 U.S. at 315 ("We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of '"the self-executing character of the constitutional provision with respect to compensation . . . ."'"). If this were not so, either Congress or the state would have to act before an

individual could enforce the right to damages. In this scenario, the Takings Clause would merely be capable of execution, not "self-executing."

But the Takings Clause *is* self-executing and, as a result, principles of immunity must yield to compensation for a taking. *See First English*, 482 U.S. at 316 n.9 (rejecting the United States' argument that sovereign immunity principles compel the conclusion that the Takings Clause does not provide a damages remedy); *see also Hendler v. United States*, 952 F.2d 1364, 1371 (Fed. Cir. 1991) (noting that, because a federal takings suit is "based upon the constitutional provision protecting property rights, and the provision was considered to be self-executing with respect to compensation, it escaped the problems of sovereign immunity"); *SDDS, Inc. v. South Dakota*, 650 N.W.2d 1 (S.D. 2002) (self-executing nature of just compensation claims overrides state's immunity); *Boise Cascade Corp. v. Oregon*, 991 P.2d 563 (Or. Ct. App. 1999) (same); *see generally* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885, 981 (2000) (citing *First English* for proposition that "the Takings Clause has been held to incorporate a self-executing waiver of state and federal sovereign immunity against claims for monetary compensation"); Garrett Power, Palazzolo v. Rhode Island: *Regulatory Takings, Investment-Backed Expectations, and Slander of Title*, 34 Urb. Law. 313, 324 (2002) (A regulatory takings "claim would not be barred on sovereign immunity grounds because 'the self-executing' nature of the Fifth and Fourteenth Amendments to the U.S. Constitution would override any such claim federal or state governments would have.").

The Fourteenth Amendment incorporated the Takings Clause of the Fifth Amendment against the states, lock, stock, and barrel. Neither this Court, nor any other, has suggested that this provision was partially incorporated. And while only certain provisions of the Bill of Rights have been incorporated

thus far, this Court has never found that the Fourteenth Amendment partially incorporates the constitutional protections that it does import. There is thus no reason to suspect that anything less than entire the Takings Clause, compensation requirement included, was incorporated against the states through the Fourteenth Amendment. This Court should, therefore, grant the petition for certiorari to end the misperception that the Eleventh Amendment is a bar to suits against states for violations of the Fifth Amendment.

C. The Decision Below Adopts a System in Which Federally Protected Property Rights Will Be at Risk of Lacking any Forum for Vindication

If the decision below is left undisturbed and the state is immune from suit for federal takings claims in *federal court*, states may assert next that they are also immune from suit for federal takings claims in *state court*. *See Alden v. Maine*, 527 U.S. at 745 ("We have said on many occasions, furthermore, that the States retain their immunity from private suits prosecuted in their own courts."). As noted above, *Alden* is clear that decades of this Court's jurisprudence are dedicated to the principle that sovereign immunity is equally applicable in state and federal courts. *Id.* at 747-48. The position adopted by the court below—that the Takings Clause abrogates sovereign immunity in state court but not in federal court—is difficult to reconcile with *Alden*. *See DLX*, 381 F.3d at 527-28. In accordance with *Alden* and as explained in section I.A., *supra*, if a federal takings claim may not be heard in federal court without a state's consent, states will argue that a claim may not be heard in *any* court without a state's consent. In such a system, the Takings Clause is robbed of its vitality and reduced to a mere declaration or aspiration of moral government.

As noted above, this Court made clear in *First English* that compensation is the *required* remedy for a taking. *First English*, 482 U.S. at 315 (explaining that "government action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation'" (quoting *Armstrong*, 364 U.S. at 49)). This was no mere passing mention in *First English* but the result of a nearly decade long jurisprudential parley begun in earnest with Justice Brennan's 1981 dissent in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 636 (1981), and completed when the *First English* Court adopted Justice Brennan's view in 1987. And while other "postdeprivation remed[ies]" may also be available, *City of Monterey*, 526 U.S. at 712, "the compensation remedy is required by the Constitution" when a taking is alleged. *First English*, 482 U.S. at 316. In earlier cases, this Court made clear that the remedy for takings claims is nearly always "just compensation" and *not* injunctive relief. *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932).

If compensation claims are subject to traditional sovereign immunity principles, however, a claim for compensation could never be filed against a nonconsenting state in federal court. This cruel trap forces a property owner whose land has been taken by the state to seek a "remedy" which forces him out of federal court and arguably precludes him from state court. For any other kind of claim, such a litigant could simply elect to pursue prospective injunctive relief in federal court and avoid Eleventh Amendment problems, but even this avenue is unavailable because he is constitutionally compelled to pursue compensation. Under the scheme adopted by the court below, nonconsenting states are potentially immune from federal takings claims in any forum. Even a litigant subjected to a physical invasion of his property would not be able to press his federally protected rights but would, instead, be forced to pursue whatever remedies, if any, the state may philanthropically agree to provide.

"If a state may not be sued for damages by a private citizen in federal court, and a state may not be sued by a private citizen in its own courts, what recourse does a plaintiff have?" Robert V. Percival, *"Greening" the Constitution—Harmonizing Environmental and Constitutional Values*, 32 Envtl. L. 809, 839 (2002). If the decision below is correct, this is the exact catch-22 that property owners will find themselves subjected to. Normally required to sue for compensation by this Court's decision in *First English* and *Hurley*, they find the doors of the federal courthouse closed. Potentially subject to the strictures of sovereign immunity in state courts, they will find their federally protected rights at risk. Their right to use and retain private property thus becomes wholly dependant on the whims of the Legislature's underdeveloped capacity for accountability and self-restraint. In such a scheme, the Takings Clause is not even a "poor relation" but a forgotten relic. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994). This result is inconsistent with the primacy of individual rights in property and with 200-plus years of this Court's Takings Clause jurisprudence.

CONCLUSION

At a minimum, it is unclear whether this Court's decisions on the self-executing nature of the Takings Clause abrogate state immunity in federal court, state court, neither, or both. As the Sixth Circuit noted in the decision below, legal scholars and this Court's dicta suggest that the question remains open. *See DLX*, 381 F.3d at 527 (noting that leading commentators suggest this question is an open one). This petition thus presents an important question: whether the principles behind the Takings Clause must give way to the principles behind the

Eleventh Amendment. For the foregoing reasons, this Court should grant the petition for certiorari and reverse the decision of the court below.

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